Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

FRANCES CALLAHAN,

Petitioner,

v.

SUFFOLK COUNTY DEPARTMENT OF

SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the application of New York State law violate the Supremacy Clause by authorizing a lien to be placed against a tort recovery of a Medicaid recipient in contravention of federal law which does not allow a lien to be placed against a Medicaid recipient's assets during the Medicaid recipient's lifetime?

2. Does New York State's implementation of its subrogation and lien statutes to satisfy a Medicaid lien violate the Supremacy Clause by recouping medical assistance benefits from tortfeasors' assets that were intended to compensate plaintiffs for damages other than medical ?

3. Does this Court's "literal text" standard applied to a remedial Social Security statute require
that reimbursement of total Medicaid benefits be made only upon the death of a disabled beneficiary
of a trust?

4. Does this Court's "literal text" standard applied to the federal Medicaid assignment statute
require a Medicaid agency to pursue tortfeasors directly rather than impose a lien against a
Medicaid victim's lawsuit recovery?

PARTIES TO THE PROCEEDING

Petitioner Frances Callahan is a severely impaired Medicaid recipient whose Guardian established an inter vivos trust funded with a 1991 lawsuit recovery based on a 1993 federal statute that provided reimbursement to the State for an amount up to the total Medicaid provided to the petitioner from trust the assets remaining upon her death.

The Respondent is the Suffolk County Department of Social Services (DSS) which is the Medicaid agency that administers the Medicaid program for the New York State Department of Health (State). The New York State Department of Health is the single state agency that receives federal monies pursuant to a State Medicaid Plan in which the State has agreed to comply with all federal statutory and regulatory requirements.

STATEMENT OF JURISDICTION

Petitioner seeks a review of the April 6, 1998 New York State Court of Appeals Callahan decision. Jurisdiction is invoked under 28 U.S.C. §1257(a) which provides that this Court may review the decision of the highest court of a state of the United States of America, where "the validity of ...a statute of the United States is drawn in question or whether the validity of a statute of any state is drawn in question on the ground if its being repugnant to ....laws of the United States." Id.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The major constitutional and statutory provisions involved in this case are:

1. **The Supremacy Clause** - United States Constitution, Article VI, Clause 2.

   This constitution, and the laws of the United States ... shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

2. **The federal Medicaid Anti-lien Statute** - 42 U.S.C.§1396p(a)(1) and (b)(l):

   No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid- on his behalf under the State plan, except ...Emphasis Added.

   No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except... Emphasis Added. .

3. **The federal 1993 Disabled Trust Statute-** 42 U.S.C.§1396p(d)(4)(A):

   A trust containing the assets of an individual under age 65

who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter. Emphasis Added.

4. **State Plan Mandatory Compliance with anti-lien statute** - 42 U.S.C.§1396a(a)(18):

A State plan for medical assistance must - (18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medial assistance correctly paid, transfers of assets, and treatment of certain trusts; Emphasis Added.

5. **State Obligation to Pursue Third Parties** - 42 U.S.C. §1396a(25)(A):

(T)hat the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan. Emphasis Added.

6. **State's duty to recover from legally responsible party** 42 U.S.C. §1396a(a)(25)(B):

(T)hat in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the cost of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability . Emphasis Added.

7. **State acquires rights of Medicaid recipient**- 42 U.S.C. §1396a(a)(25)(I):

(T)hat to the extent that payment has been made under the State plan for Medical Assistance in any case where a third party has a legal liability to make payment for such assistance, the State [shall have] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." Emphasis supplied.

8. **Medicaid recipient's assignment of rights to the State**- 42 U.S.C. §1396k(a)(1)(A):

(1) (T)hat as a condition of eligibility for medical assistance.. the individual is required

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute and assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party ." Emphasis added.

9. **State's duty to collect third party resources** - 42 U.S.C.§1396k (b):

Such part of any amount collected by the State under an assignment made under the provisions of the section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual. Emphasis Added.

10. **State Lien Statute** - New York State Social Services Law §104-b.

If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim, or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of assistance of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred. Emphasis Added.

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Petitioner Frances Callahan, by her legal Guardian Patricia Callahan, respectfully requests that this Honorable Court issue a Writ of Certiorari and review the April 6, 1999 Callahan decision of the New York State Court of Appeals which held that an entire lawsuit recovery must be used to satisfy a Medicaid lien before a Supplemental Needs Trust may be established. Appendix A.

OPINIONS BELOW

This case has had a complicated procedural and appellate history. On August 12, 1991, the tort action, Callahan v. Good Samaritan Hospital, No. 17307/85 (Sup. Ct. Suffolk Co. 1991) was settled. The trial judge in Suffolk County Supreme Court, Justice Robert Doyle, approved a Compromise Order which provided that the defendants pay the plaintiff $375,000. After attorney's fees were paid, the plaintiff had a net recovery of $244,394.99. In this case, the Medicaid lien of $421,375.12 exceeded the gross settlement of $ 375,000. As part of the Order, the trial judge allocated the entire recovery for pain and suffering and dissolved the Medicaid lien, declaring "that the lien of the Suffolk County Department of Social Services against FRANCES CALLAHAN be and the same is hereby discharged and dissolved." Appendix B.

The Guardian of Frances Callahan applied to the Queens County, New York Supreme Court to establish a Supplemental Needs Trust pursuant to 42 U.S.C.§1396p(d)(4)(A). Suffolk County DSS objected, claiming that its lien had been wrongfully dissolved in 1991.

On May 10, 1996, Queens County Supreme Court Justice Edwin Kassoff issued the Callahan I Order and authorized the transfer of all of the tort proceeds into a Supplemental Needs Trust (SNT). Relying upon Cricchio v. Pennisi, 640 N.Y.S. 2d 573 (App. Div. 2 Dept. 1996), the court ordered that any reimbursement for Medicaid provided would be deferred until the death of the SNT beneficiary. Appendix C.

The Suffolk County DSS appealed this Callahan I order. The New York City Medicaid agency appealed the Cricchio Appellate Division decision.

On March 25, 1997, the New York State Court of Appeals reversed the Appellate Division Cricchio decision. Cricchio v. Pennisi, 90 N.Y.2d 296 (1997). As originally issued, the Cricchio Court of Appeals decision determined that only the portion of a personal injury award intended to compensate a plaintiff for past

medical expenses was available to satisfy a Medicaid lien. The Court of Appeals remitted the Cricchio cases to the trial courts for an allocation hearing to determine how the Medicaid lien would be satisfied. N.Y.L.J. March 26, 1997, at p. 26 col. 1. On April 18, 1997, the City of New York Medicaid agency filed a Notice of Motion for Clarification of the Remittitur in Cricchio.

On May 27, 1997, in compliance with the Court of Appeals Cricchio decision, the Appellate Division reversed the Supreme Court's May 10, 1996 Callahan Order that had deferred satisfaction of the lien. The Appellate Division remitted the case to the Supreme Court "for a hearing to determine the portion of the recovery that was intended to compensate the plaintiff for past medical expenses, and whether the recovery was intended to compensate the plaintiff for past
medical expenses, and whether the settlement was consciously structured to frustrate the Medicaid lien (see, Gromalski v. County of Nassau, 204 AD2d 391). Emphasis added." In re Callahan, 658 N.Y.S. 2d 974 (App. Div. 2 Dept. 1997). Emphasis Added.

On July 1, 1997, the Court of Appeals granted the City of New York's Cricchio Motion and amended its March 25, 1997 Cricchio decision which had directed the trial court to determine what portion of the settlement would be allocated for past medical expenses. The Court replaced that holding with a remittitur decision that reserved for the trial court the authority to determine what legal standard to apply in satisfying the lien. "Given that the parties did not present any arguments to this Court concerning whether the entire amount of the personal injury settlement or only that portion attributable to past medical expense is available to satisfy the lien, we do not pass
on the question, which must be addressed in the first instance by the court on remittal." Cricchio, 90 N. Y.2d at 684. R. 297.

On April 16, 1998, pursuant to the Callahan I Appellate Division remittitur, the Supreme Court ordered that a hearing be held to determine what portion of the personal injury settlement would be allocated to past medical expenditures and what portion would be allocated to satisfy the Medicaid lien for medical expenditures prior to the establishment of a SNT. Appendix D. On May 4, 1998, the New York State Appellate Division issued Calvanese v. Calvanese, 672 N.Y.S.2d 410 (App. Div. 2 Dept. 1998) in which it determined that the entire amount of a personal injury recovery, not only that portion intended to compensate the

tort victim for past medical expenses, was available to satisfy a Medicaid lien. The DSS filed a Motion to clarify the Appellate Division's Callahan I remittitur Order.

On October 19, 1998, the Appellate Division rendered its Callahan II decision and followed its Calvanese decision. In re Callahan, 678 N.Y.S. 2d 741 (N.Y. A.D. 2 Dept. 1998). The Appellate Division determined that the entire amount of the lien was to have been paid prior to the establishment of the SNT. "Since the entire amount of the settlement proceeds is available to satisfy the Medicaid lien, the Petitioner's application to establish a supplemental needs trust with those proceeds before satisfying the lien must be denied (see Calvanese v Calvanese, __ AD2d __ (2 Dept., May 4, 1998); see also, Cricchio v. Pennisi, 90 NY2d 296."

Petitioner Callahan filed a Motion for Leave to Appeal the Appellate Division decision to the New York State Court of Appeals arguing that the Calvanese decision was in error. On December 22, 1998, the Court of Appeals granted the Motion, and the case was heard in tandem with the Calvanese appeal.

On April 6, 1999, the New York State Court of Appeals rendered a joint decision in Calvanese v.Calvanese and In re Callahan and affirmed the Appellate Division decisions. The court held that the entire recovery was available to satisfy the lien and that the lien must be satisfied prior to the establishment of a Supplemental Needs Trust (SNT). In the case of Frances Callahan, this meant that she would receive no net recovery.

STATEMENT OF THE CASE

FRANCES CALLAHAN is a 30 year old woman who was severely injured at birth. She is mentally retarded and suffers from cerebral palsy. (R. at 107, 199, 413). She cannot speak or walk or perform any activity of daily living unassisted. She communicates with a message board.

Frances presently resides in the section of an institution along with 10 other severely disabled wheelchair bound residents, none of whom can speak. Some of the residents can communicate with message boards, however, only if there is sufficient staff to assist the residents with their message boards. See Olmstead v. Zimring, __ U.S. __ (1999).

Patricia Callahan, Frances' mother, on behalf of Frances, sued the hospital in which Frances' was born and the doctors who delivered Frances. The plaintiff alleged that malpractice

had been committed during Frances' birth. The local Medicaid agency was notified of the lawsuit. Frances assigned her right of recovery against the defendants to the Medicaid agency.

On May 5, 1986, when FRANCES CALLAHAN was 19 years of age, Suffolk County Department of Social Services filed a lien against the proceeds of the personal injury lawsuit for $85,258.13.(R. 155). A total of $87,906.20 in Medicaid benefits were expended prior to the petitioner's reaching the age of 21. An additional $333,468.92 was paid on her behalf from the time she reached the age of 21 until the date of the settlement in 1991. An additional $197,131.80 of Medicaid monies were expended from the settlement date until August 10, 1993, the date of the enactment of the federal OBRA 1993 legislation which authorized payback trust funds for the disabled. (R. 155).

Prior to trial, plaintiffs tort counsel recommended that the plaintiff settle the case because of the difficulty of proving the defendants liable for the damages. One of factual issues presented in the case was whether the mother's smoking was a contributing factor to the damages. Frances' tort counsel recommended to Frances' mother that she not risk a defendants' verdict. Tort counsel recommended that plaintiff accept the defendants' offer of settlement of $ 375,000 which would
provide a net recovery to petitioner of $244,000.

Patricia Callahan realized that a tort settlement of $244,000 was at risk of being quickly exhausted by paying for her daughter's extraordinary health care needs. She sought legal advice for a remedy to shield the assets to be able to be used for the lifetime of her daughter. Outside counsel was consulted regarding the Medicaid law. Medicaid counsel recommended the use of a Supplemental Needs Trust based on Hughes v. Physician's Hospital, 566 N.Y.S. 496 (Queens Co. Sup. Ct. 1991) which relied upon the unappealed Navarro by Navarro v Secretary, 751 F. Supp. 349 (E.D.N Y. 1990).

On August 6, 1991, the Supreme Court appointed Patricia Callahan the Committee for her daughter FRANCES CALLAHAN.[1] R. 206. Based on the advice provided by her

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[1]In 1992. the State of New York replaced its Committe statute with a Guardianship statute. Article 8 I of the Mental Hygiene Law.

counsel and her understanding that the monies paid by the defendant to the plaintiff could be placed into a Hughes Supplemental Needs Trust to be used to benefit her daughter for a lifetime, Committee-mother Callahan agreed to settle the action.

Committee-mother Callahan at the tort settlement conference agreed to the settlement terms in which the petitioner would receive $244,000. The DSS was not present at the settlement conference.

On August 12, 1991, Justice Doyle signed a Compromise Order, Callahan v. Good Samaritan Hospital, No. 17307/85 (Sup. Ct. Suff. Co. 1991), approving the settlement of the medical malpractice action for a total amount of $375,000. After the payment of attorney's fees, the severely disabled FRANCES CALLAHAN was to receive $244,394.99 as net payment from the defendants. (R. at 24-25).

The August 12, 1991 Supreme Court Compromise Order explicitly directed "that the lien of the Suffolk County Department of Social Services against FRANCES CALLAHAN be and the same is hereby discharged and dissolved." (R. 25). The court also explicitly ordered "that all of
the proceeds of the settlement be and hereby are allocated to compensate the plaintiff FRANCES CALLAHAN for her pain and suffering." (R. 25).

On June 16, 1993, FRANCES CALLAHAN's Guardian-mother petitioned the Supreme Court for permission to transfer the tort settlement into an SNT. R. 199-204. The State of New York, R 145-148, and the County of Suffolk opposed the petition, R.152-159.

On June 23, 1993, realizing that the tort settlement for her severely disabled child was at risk, Guardian Patricia Callahan wrote to First Lady Hillary Clinton and explained the plight of her daughter Frances and the supplemental needs trust that was proposed. The Guardian-mother sought the federal government's assistance to save Frances' tort settlement.

On July 23, 1993, the New York State Legislature enacted its own Supplemental Needs Trust statute for disabled persons, EPTL 7-1.12. This statute was applicable only to trusts
established by third parties for the benefit of the disabled. The assets and income of these trusts would not disqualify disabled

beneficiaries from receiving government entitlements. There was no payback upon the death of these third party trusts, as the Legislature realized that individuals not legally liable for the support of their disabled loved ones would not establish such trusts if these assets were eventually going to be paid to the State.

On August 11, 1993, President Clinton signed into law OBRA 1993 which included the new Trust provision for disabled persons under 65. 42 U.S.C.§1396p (d)(4)A). Disabled persons could now protect their assets by transferring the assets in an inter vivos trust on the condition that Medicaid be paid back from the remainder of the trust assets upon the death of the disabled person. Id. Each state was to enact companion legislation during its next legislative cycle.

On September 30, 1993, Department of Health and Human Services Director of the Medicaid Bureau Sally R. Richardson, on behalf of First Lady Clinton, wrote to Mrs. Callahan and informed her of OBRA 1993 which would be effective on October 1, 1993. R. 308. "To be non countable, the trust instrument must also provide that the State will receive any funds remaining in the trust after the person's death, up to the amount of Medicaid benefits paid on behalf of the person." Emphasis Added. Appendix E.

On November 12, 1993, the DSS opposed the Guardian-mother's petition to transfer the assets into the SNT and counter claimed for payment of the Medicaid lien. R. 153-158. On December 14, 1993, the State of New York opposed the petition. R. 145-147.

On December 30, 1993, Medicaid Director Sally Richardson wrote a letter to City of New York Medicaid counsel Howard Gibbs regarding the then pending Reyes case. Appendix F. Director Richardson clarified this new federal Trust statute. Reyes was a case in which the Medicaid lien was less than the tort settlement. Director Richardson addressed the issue of whether a "priority" or " allocation " standard should be used as to satisfaction of the Medicaid lien that had accrued prior to the transfer of assets into an OBRA 1993 Trust. Medicaid Director Richardson discussed the interplay between the Medicaid assignment statute, the Medicaid anti-lien statute, and OBRA 1993:

> If, under State law, a lien is not being placed upon the Medicaid recipient's property, but rather is

> being placed upon the tortfeasor's (the defendant in the personal injury litigation) property or upon funds which are set aside to be used in a settlement of the litigation, but which have not become Ms. Reyes' property. then there would be no conflict with section 1917 (a) of the Act. This is because section 1917 (a) only precludes States from placing liens on an individual's property. It would appear that New York has an interest in the potential personal injury settlement, since Ms. Reyes' rights to recover payment for medical care must have been assigned to the State under Section 1912 of the Act in order for her to be eligible for Medicaid. In that event, if New York places a lien on those funds, it does not violate the Medicaid statute. However. it cannot impose a lien on any of Ms. Reyes property which has not been assigned to the State.
>
> It appears that the State has some options in dealing with Ms.Crannage. It could, if permitted under State law, place a lien on the tortfeasor's property. It could agree with Ms. Crannage on a settlement of the tort action in which it gets an appropriate interest, or it could intervene in the case and rel:!resent its own interests directly." Emphasis Added. R. 310.

On September 1, 1994, the State of New York's legislation implementing the federal OBRA 1993 statute became effective. The EPTL §7-1.12 was amended and subsection (a)(5)(v) was added to provide for self-settled trusts with a payback to the State for an amount up to the total of all Medicaid expended upon the death of the SNT beneficiary. See In re Moretti,. 606 N.Y.S. 2d 543 (Sup. Ct. Kings. Co. 1993).

On April 1, 1996, the Appellate Division rendered its decision in Cricchio v. Pennisi, 640 N. Y.S.2d 573 (App. Div. 2 Dept. 1996). Cricchio held that "the satisfaction of a pre-existing Medicaid lien is not a precondition to the funding of a special needs trust." - Id. at 578.

On May 10, 1996, the Queens County Supreme Court followed the Appellate Division 1996 Cricchio decision and Justice Doyle's 1991 Order, with its explicit discharge of the

Medicaid lien and its explicit allocation of the settlement for Frances' pain and suffering, by ordering FRANCES' net settlement to be placed into a Supplemental Needs Trust Fund for her benefit. (R. at 5-14). The Order and Judgment directed that "upon the death of FRANCES CALLAHAN, this Supplemental Needs Trust Fund for FRANCES CALLAHAN shall terminate, and the State shall be reimbursed from the principal and accumulated income in the trust fund for an amount up to the total lifetime medical assistance provided to FRANCES CALLAHAN." (R. at 8). The Order and Judgment further directed that "repayment of the Medicaid benefits provided to FRANCES CALLAHAN be and the same hereby is deferred until the death of FRANCES CALLAHAN." Id. Appendix C.

DSS appealed this May 10, 1996 Order. While the appeal was pending, the Supplemental Needs Trust was established and funded with the tort settlement funds subject to the result of the appeal.

On June 5, 1996, Medicaid Director Sally Richardson issued a Memorandum to all Medicaid Directors regarding SNTs. R. 315. Appendix G. This Memorandum, which would be later cited by the New York State Court of Appeals in its Cricchio decision at n. 6, explained the federal government's interpretation of OBRA 1993 and the interrelationship to the federal Medicaid assignment statute and the federal Medicaid anti-lien statute. "If State law permits, a State can place a lien upon a third party's property, as in a situation involving the property of a tortfeasor or defendant in a personal injury suit, or upon funds which are set aside to be used in a settlement, but which have not yet become the property of the Medicaid applicant or recipient." Emphasis Added.

The June 5, 1996 "Richardson" Memorandum was issued after SNT- Medicaid lien litigation had been percolating across the country for almost three years. As Secretary Shalala had not promulgated OBRA 1993 regulations, this Memorandum was issued to all 50 State Medicaid Directors regarding SNTs as a statement of the federal government's policy. The HCFA memo was consistent with HCFA letters, rejected the "priority" standard, and established a "portion" standard. Director Richardson

explained the federal "portion" standard:

> Thus, if an individual is already Medicaid eligible at the time he or she receives a third party settlement or judgment, the State has claim to any portion of the proceeds which were intended to pay for medical care for the individual that is covered by Medicaid." Id. at p. 3. R. 315.

Director Richardson further clarified the options of the Medicaid agency to protect its claim by accepting an "appropriate" share of the monies received by the plaintiff or representing its own interests directly against the defendant:

> To avoid the lien issue, but protect its rights, a state could come to an agreement with a plaintiff on the settlement of a tort action in order to get an appropriate share. Alternatively, the State could intervene in the case and represent its own interests directly. Since the individual has assigned to the State his or her rights to recover payment for medical care under section 1912, the State has an interest which it can represent directly." Emphasis Added. R.315.

On September 9, 1996, Acting HCFA Medicaid Director Steve Mc Adoo wrote a letter to a South Carolina attorney who had made an inquiry as to the federal position in a case in which the Medicaid lien is greater than the settlement. R.320. Appendix H. Acting Director Mc Adoo explained that the portion of a settlement that is intended to pay for prior medical expenses is to be paid to the Medicaid agency. "If an individual is Medicaid eligible at the time of a settlement or judgment, the Sate has claim to any portions of the proceeds that were intended to pay for medical care for that individual that is covered under Medicaid, and that the individual needs as the result of an injury caused by the tortfeasor." Emphasis Added.

Because the federal government's interpretations of OBRA 1993 had been in letter form because Secretary Shalala had not promulgated any regulations pursuant to the Administrative Procedure Act, on November 12, 1996, Frances Callahan petitioned Secretary Shalala to promulgate OBRA 1993 regulations. See 5 U.S.C. §553 (e) and Auer v. Robbins, 519 U.S. 452 (1997). Guardian-mother Callahan sought a regulation that

tracked the words of the enabling statute that explicitly provided for the deferment of payment of the Medicaid lien that had accrued prior to establishment of the Supplemental Needs Trust until death. In the alternative, Frances Callahan requested that Secretary Shalala implement the Negotiated Rulemaking Act of 1990.

On January 6, 1997, Acting Director of the Medicaid Bureau Judith Moore advised petitioner's counsel that the Secretary would not be promulgating OBRA 1993 regulations to establish the standard to be applied in cases involving SNTs and Medicaid liens. "Nevertheless, we have considered your request to modify the interpretation to defer any payments to Medicaid until a disabled individual has died. In light of our analysis in the interpretation, we believe the position you have advocated would violate the statute." R. 327.

Acting Director Moore also rejected a request for negotiated rule-making." After carefully considering such variables as the enormous amount of time and resources that we believe this process would involve as well as the likelihood that the parties interested in this issue would ever reach a consensus, we have concluded that this issue is not an appropriate candidate for negotiated rulemaking." R. 327.

On March 25, 1997, the New York State Court of Appeals reversed the Appellate Division Cricchio decision. In its March 25, 1997 Cricchio decision, the Court remitted the case to the trial court. " Accordingly on remittal, the courts must allocate that portion of the recovery that is intended to compensate each plaintiff for past medical expenses and from that amount determine the sum owed to the public welfare official to satisfy the lien." Slip opinion at 14. Emphasis supplied. However, on July 1, 1999, the Court recalled this portion of its decision and remitted the cases to the trial judges to determine the standard to be used to satisfy the Medicaid lien.

On October 31, 1997, Department of Health Records Access Oficer James O' Meara responded to a New York State Freedom of Information Law (FOIL) request for the documents which reveal the standards upon which local Medicaid agency subrogation claims were based. Mr. O' Meara advised that there

were no documents. "Therefore, there are no written standards or documents provided to local agencies on the subject." R. 367.

On February 10, 1998, based on the Appellate Division Callahan I remittitur, the Queens County Guardianship Court attempted to settle the case. However, a settlement could not be reached. The court heard oral argument as to which standard should be applied to the facts of the case. Respondent Callahan argued that the Supreme Court should determine what portion of the settlement was attributable to past medical expenses and satisfy the lien from that portion. The Suffolk County Department of Social Services argued that the entire award was available to satisfy the Medicaid lien and must do so prior to any allocation for any other causes of action. R. 369-408.

On April 16, 1998, the Guardianship court followed the Appellate Division Callahan I decision which had remitted the case to the Supreme Court to hold an allocation hearing. "Accordingly, this court must conduct an allocation hearing. The parties are directed to contact the chambers of this Court regarding a date for the allocation hearing." R.475. Appendix D.

The DSS appealed this decision. On October 19, 1998, the Appellate Division reversed. In re Callahan, 678 N.Y.S. 2d 741 (Ap. Div. 2 Dept. 1998) . On December 22, 1999, the Court of Appeals granted the Guardian-mother Callahan's Motion for leave to appeal the decision. R. 477.

Ironically, on December 23, 1999 the State of New York's settled its suit against the tobacco industry and recovered 25 billion dollars based in large part on the federal assignment statute at issue in Callahan. State of New York v. Morris, 686 N.Y.S. 2d 564 (Sup. Ct. Queens 1998). "Highly significant to the State's quest for reimbursement for Medicaid losses for tobacco-related illness was defendants' argument that subrogation was the exclusive remedy under Social Services Law §367-a(2)(b)." Id. at 567.

Before the Court of Appeals, Guardian Callahan argued that Medicaid's remedy to recover past medical expenses paid to tort victims was to comply with the federal assignment statute and pursue its third party recovery directly against the defendants, as it did in State v. Morris. The appellant argued that the State should

not impose liens against plaintiffs in violation of the federal statute that prohibits liens against assets of Medicaid recipients during her lifetime. 42 U.S.C. §1396p(a)(1). The Court of Appeals rejected all of the Guardian-mother Callahan's arguments.

As of the date of this petition, the assets remain in the SNT because of the grace of the Suffolk County DSS based on Guardian-mother's representation that a petition for a writ of certiorari would be filed. However, based on the New York State Court of Appeals' decision, at any time the DSS can enforce the Callahan decision and secure all of the assets in the SNT whereby Frances Callahan will receive no further benefit from the tort settlement. Hence, the importance of Guardian-mother Callahan's quest to retain the meager Supplemental Needs Trust to provide Frances with a lifetime of comforts not provided by the State of New York.

REASONS FOR GRANTING THE WRIT

Congress intended that Medicaid recipients establish inter vivos trusts with tort proceeds to pay for items of need not paid for by the Medicaid program. 42 U.S.C.§1396p(d)(4)(A). Congress intended that a public-private partnership develop to meet the lifetime needs of a disabled population that could not cure its poverty by employment. However, in Callahan, that remedial Congressional purpose has been thwarted because of the State's application of a State lien statute that is contrary to the federal Medicaid anti-lien statute. Over five years have now passed since the "payback" trust statute was enacted. The Secretary of HHS has not promulgated any regulations to implement this remedial statute. As a result, each state is making its own interpretation of the intent of Congress, sometimes consistent with HCFA Director Richardson's own interpretation of OBRA 1993 and sometimes, as in this case, contrary to the HCFA interpretation. If this Court grants the petition, the Court can review this remedial statute and determine whether Congress intended that Medicaid recipients pay off Medicaid liens in full prior to establishing trusts which require that upon death an amount up to the total Medicaid received then be paid back from the trust assets.

This case has national importance because Congress intended that the same federal anti-lien, assignment, and payback trust statutes apply in all 50 States. If the decision is not reversed, then there is a likelihood that states will model their own state lien statutes after New York State Social Services Law §104-b in order to recover tort proceeds from the vulnerable Medicaid plaintiffs, rather than directly from the wrongdoing defendants. See Norwest Bank of North Dakota v. Doth, 159 F. 3d 328 (8th Cir. 1998) and the State of Minnesota's reference to the New York State lien law. See Wallace v. Jackson. State of Utah. Mc Neil et. al., 972 P. 2d 446 (Utah 1998) and the State of Utah's reference to the New York State lien law. See also the pending petition for a writ of certiorari, Mc Neil v. State of Utah. Medicaid Section, in which petitioner McNeil is making the same federal arguments as petitioner Callahan. Moreover, New York State's application of this lien statute results in all of a lawsuit recovery, not only that earmarked for past medical expenses, being available to satisfy this lien.

The issue of whether a Medicaid lien must be satisfied prior to the establishment of a Supplemental Needs Trust has been litigated for over five years, in large part because the Secretary of Health and Human Services (HHS) has not promulgated regulations to implement OBRA 1993. This has resulted in courts around the country rendering decisions that apply one of three standards:

A) Total deferral of the lien until death This standard provides that the prior Medicaid lien should be deferred until the death of the Trust beneficiary. This was the standard that the New York Court of Appeals rejected when it rendered its Cricchio v. Pennisi, 90 N.Y.2d 296 (1997) decision and reversed the Appellate Division's decision in Cricchio v. Pennisi, 640 N.Y.S. 2d 573 (Ap. Div. 2 Dept 1996). This is the standard that the petitioner argues Congress intended that all of the States apply .

B) Allocation of the lien This standard would provide the trial court with the authority to make a determination as to how much of the net settlement, if any, is to be allocated to pay for past medical expenditures and how much of the net settlement is to be

allocated for the plaintiffs pain and suffering, economic loss, and future needs. Only that portion allocated for past medical expenditures would be available for defendant to pay the Medicaid agency in order to satisfy a Medicaid lien. This was the New York State Court of Appeals March 25, 1997 Cricchio standard until the Court rendered its July 1, 1997 decision which recalled the "allocation" sentence from its original Cricchio decision. This is the standard that is found in the "Richardson " memo and the "Mc Adoo" letter whereby the "portion of the proceeds" that is intended to pay for prior medical expenses are to be paid by the defendants directly to the Medicaid agencies.

C) Priority lien of Medicaid. This standard provides that the Medicaid lien is a priority that must be paid prior to any payment for other elements of a net tort settlement and prior to the establishment of an OBRA 1993 inter vivos trust fund. This is the standard that the New York State Court of Appeals established in its Callahan decision which was decided in tandem with Calvanese v. Calvanese. Petitioner argues that this standard violates the anti-lien and the assignment statutes by recovering all support, not only medical support, from lawsuit recoveries.

Callahan provides the Court with an opportunity to clarify the meaning of the Medicaid anti-lien state as applied in all 50 States and decide whether the Medicaid agency has a statutory duty under the assignment statute to sue the defendants directly to recover medical expenses from the defendants, rather than from the plaintiffs. Petitioner Callahan argues that the benign 1993 Congress, which enacted a remedial statute that allows a Medicaid recipient to preserve proceeds of a tort action by establishing an inter vivos trust, could never have intended the bizarre result that Frances Callahan receive nothing for her grievous injuries. The Medicaid agency did not sue the defendants directly to recover its medical expenses as required by the plain meaning of the federal Medicaid assignment statute. By placing a lien on Frances' own property, and by having this lien extend to the entire recovery, rather than that portion allocated for past medical expenses, the agency violated federal law and the supremacy clause.

Thus, Callahan presents an important public policy issue for the Court to review. Application of the present Callahan

standard will deter plaintiffs in all 50 States with Medicaid liens greater than defendants' settlement offers from ever entering into settlements of their cases. Rather, the plaintiffs will litigate their actions and risk defendants' verdicts rather than recover amounts sufficient only to pay for attorneys' fees and the Medicaid liens. Defendants' verdicts will result in no satisfaction of Medicaid liens and no Supplemental Needs Trusts with paybacks to the State upon the death of the beneficiary. The public coffers will suffer. Only third party defendants, whose legal liabilities have not been proven at trial, will benefit from the Callahan II legal standard.

Therefore, the petitioner makes the following points in support of this petition:

POINT I

NEW YORK STATE'S LIEN LAW AS APPLIED VIOLATES THE SUPREMACY CLAUSE BECAUSE CONGRESS INTENDED THAT NO LIEN BE IMPOSED ON A MEDICAID RECIPIENT'S PROPERTY DURING HER LIFETIME

This Court should grant the petition because the New York State Court of Appeals' Callahan decision, affirming the Medicaid agency's application of the New York State lien statute, violates the Supremacy Clause, United States Constitution, Article VI, Clause 2. The Congress could not have been clearer when it enacted the anti-lien provision. "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan..." 42 U.S.C.§1396p(a)(1).

However, as the Callahan facts reveal, the State of New York has flaunted the federal Medicaid anti-lien statute and applied a lien to Frances' 1991 tort settlement. The New York State Court of Appeals has ratified the State's use of its lien and simply ignored the plain meaning of the federal Medicaid anti-lien statute.

Callahan is not a "federalism" case because the plaintiff did not sue the State. See Aiden v. Maine, __U.S.__ (1999). Florida Prepaid Postsecondary Education Expense Board v.

College Savings Bank, __ U.S.__- (1999). College Savings Banks v. Florida Prepaid Postsecondary Education Expense Board, __ U.S. __ (1999). Quite the contrary, it is the State Medicaid agency's delegatee which is in effect suing the plaintiff by its use of a Medicaid lien in direct contradiction to the federal Medicaid anti-lien statute.

Hence, the need for the Court to nip in the bud any application of this Court's recent federalism decisions that may foster a State's belief that the federalism decisions are a license for the States to defy a clear federal statutory mandate. This is especially the case when Congress provided the States with a remedy to recover Medicaid expenditures by complying with the federal law and suing the defendants directly. See POINT III, supra. and State v. Morris.

Federal law prohibits the imposition of a lien against a Medicaid recipient's assets during her lifetime. 42 U.S.C.§1396p(a)(1). New York State Court of Appeals has ratified the State agency's use of the State lien law in a Medicaid case even though the assets passed to Frances' Committee in 1991. The Court of Appeals accepted a legal fiction that somehow Frances Callahan was holding the State's funds. In order to come to this conclusion, the New York State Court of Appeals relied upon the Social Services Law §104-b, which is the State's welfare lien law that was enacted prior to Congress' enacting the federal Medicaid program. The Court of Appeals did not discuss the statutory requirement that requires the State Medicaid Plan to comply with the federal Medicaid laws in order for the State to receive federal Medicaid funds. See 42 U.S.C. §1396a (a)(18).

In Callahan, the Court held that the settlement monies, property that had already passed in 1991 from the defendants to the plaintiff, were being held by the Trustee as a constructive trust for the benefit of the Medicaid agency and not for the benefit of the plaintiff. The New York State Court of Appeals simply ignored the federal anti-lien statute and explained its constructive trust theory by its interpretation of the State's lien law, Social Services Law 104-b, that provided the Medicaid agency with subrogation rights in addition to the statutory federal assignment right:

> In New York, as a corollary to this assignment, the local social
> services district is subrogated, to the extent of its expenditures for medical care furnished, to any rights a Medicaid recipient may have to a third party reimbursement (Social Services Law §367-1(2)(b); 18 NYCRR 360-7.4 (a)(6)). Pursuant to this assignment and subrogation scheme, the Department 'obtains all of the rights that recipient has as against the third party to recover for medical expenses, including the ability to immediately pursue those claims against the third party' Cricchio v. Pennisi, supra, 90 NY2d, at 307.
>
> As an alternative to suing the responsible third party directly,. the Department may pursue the reimbursement indirectly by placing a lien on personal injury suits brought by a Medicaid recipient against the responsible third party (see, Social Services Law §104-b). A Medicaid lien shall attach to any verdict, decision, decree, judgment, award or final order in any suit, action or proceeding in any court or administrative tribunal of this state respecting such injuries, as well as the proceeds of any settlement thereof, "and continues until discharged by the public welfare official (Social Services Law §104-b(3), (7)). Because section 104-b is "purely procedural." it does not alter the agency's substantive right to recover the amount it has expended on behalf of a Medicaid recipient. and the agency's right to recovery is the same whether it sues directly or uses a lien (Baker v. Sterling, 39 NY2d 397, 405). Emphasis Added Callahan, at slip opinion p. 4-5. Appendix A.

Contrary to the court's interpretation in Callahan, the Court of Appeals has altered the agency's right to recover the amount it has expended by making available the entire lawsuit recovery to satisfy the medical benefits provided. Any tortfeasor's assets that would have been apportioned for future needs and pain and suffering is now engulfed by this lien for medical assistance. The plaintiff suing for all damages may recover only medical

damages if the lawsuit funds are insufficient to satisfy other claims. Indeed, in the case of Frances Callahan, where the trial court allocated the entire settlement for pain and suffering, only the Medicaid agency will be made whole. The "purely procedural" 104-b lien statute now enables the agency to recover its damages without allowing the plaintiff to recover any of her damages.

As the Court of Appeals' tortured argument is grounded on the New York State's public assistance lien law, N. Y. Soc. Serv. L.§104-b, which was enacted prior to the enactment of the federal Medicaid statute, the Court of Appeals backed itself into an historical corner from which it could escape only by creating its constructive trust fiction. Thus, the Court of Appeals issued an Alice-in- Wonderland interpretation of the federal mandated Medicaid program by adding the State's lien law to the federal assignment statute, and then by subtracting the federal anti-lien statute, as if it had never been enacted by the Congress.

Even assuming arguendo that a lien is imposed against a third party's tortfeasor's funds prior to their becoming the plaintiffs property, the application of the lien statute violates the supremacy clause by seeking satisfaction of a Medicaid lien from all assets due the plaintiff rather than from only those assets allocated for past medical expenditures. The duty of the State to pursue legally liable third parties is limited to support for medical expenses. 42 U.S.C. §1396a(a)(25)(l). When the entire recovery is available to satisfy a Medicaid lien as in the Callahan case, monies earmarked for pain and suffering, future needs, and loss of earnings become subsumed by the lien.

In summary, petitioner Callahan argues that based on the supremacy clause, the State of New York's highest Court cannot simply ignore a federal statute enacted by the Congress as if the federal statute did not exist. Therefore, this Court should grant the petition and address FRANCES CALLAHAN's argument that the supremacy clause of the Constitution protects her meager Supplemental Needs Trust because the Congress enacted a statute that prohibited the State
from placing a lien on Frances' property that was paid to her by the defendants pursuant to an unappealed 1991 Court order. This Court should also address the argument that the lien statute, even

if applied to the tortfeasor's assets, expands the agency's recovery, as no other causes of action for other damages can be recovered prior to the medical needs recovery. Thus, the support for medical care statutory requirement has been broadened by the Court of Appeals interpretation to be a lien on any moneys that could be allocated for other types of support.

POINT II
BY APPLICATION OF THE SUPREME COURT'S "LITERAL TEXT" STATUTORY INTERPRETATION STANDARD, THE CONGRESS INTENDED THAT THE "TOTAL" MEDICAID LIEN BE PAID UPON DEATH OF THE TRUST BENEFICIARY

The petitioner argues that this Court need not reach the Constitutional issue if the Court grants the petition and applies its own "literal text" standard to the enabling federal statute. The petitioner argues that if words mean what they say, then the Congress intended that the "total" Medicaid be paid back at the time of the death of the Trust beneficiary, and not before.

On August 10, 1993, the federal law authorized the disabled under the age of 65 to establish trust funds with their own assets such that these trusts would not be considered available resources in computing eligibility for Medicaid. 42 U.S.C. §1396p(d)(4)(A). The Congress required that there is to be a pay back of the "total" Medicaid received during the lifetime of the Trust beneficiary only upon the death of the trust beneficiary.

Petitioner argues that this statute, clear on its face, requires that payments of any Medicaid lien should be deferred until the death of the beneficiary of a SNT. At that time, an amount not to exceed the total Medicaid provided is to be paid back. The language of this remedial statute did not provide for total reimbursement prior to the establishment of a trust and then again for the total reimbursement after death.

This Court has determined that when the Judiciary interprets a statute, it is to apply a "literal text" standard. It is the Legislative Branch of Government that establishes the standards which the Executive Branch is to apply, not the Judiciary. Hence, the Court must interpret the words of a statute by applying the

literal textual meaning of the words.

In Brogan v. United States, 522 U.S. 398 (1998), Justice Scalia used the "literal text" standard in interpreting a federal statute. The issue before the Court was whether the use of an exculpatory "no" answer was embraced within a statute, 18 U.S.C. §1001, by which "any" false statement "of whatever kind" was a violation of the statute. The Court found that the literal text of the statute required that it applied to all false statements.

The Court applied the "literal text" standard and cited to the Webster's New International Dictionary and quoted the definition of "no". The Court explicitly rejected the argument that the Court should depart from a literal text of the statute enacted by the Congress. Justice Scalia explained that the Judiciary should not usurp Congress' duty to establish standards. The Judiciary must not adopt interpretations of the law established by Circuit Courts rather than by the Congress:

> In sum, we find nothing to support the "exculpatory no" doctrine except that many Court of Appeals decisions that have embraced it. While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court's jurisprudence. Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Id. at 809. Emphasis Added.

The Brogan "literal text" standard is an emphatic extension of the Chevron doctrine. "If the intent of Congress is clear, that is the end of the matter." Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837 (,1984).

The appellant argues that the "literal text" standard should have been applied in Callahan. If there is any confusion as to the meaning of the Congressional use of the word "total", then the Court should apply the dictionary definition. As per Brogan, this Court should not redefine the word "total" to establish a policy standard - not found in the literal text of the statute.

By applying the "literal text" standard to the federal OBRA 1993 Trust statute, Congress intended that reimbursement

to the State for medical assistance be only upon the death of the Medicaid recipient. At that time, reimbursement will be made for an amount not to exceed the total medical assistance received during the lifetime of the disabled beneficiary.

The word "death" has its plain unmistakable meaning. The word "total" also has its plain unmistakable meaning. "Whole, not divided, lacking no part, entire, full, complete, the whole amount. Utter, absolute." BLACK'S LAW DICTIONARY (5th ed. 1979).

Thus, by application of the Brogan "literal text" standard, the appellant argues that Congress intended that recovery of the Medicaid provided both prior to the establishment of the Trust and the Medicaid provided after the establishment of the Trust is to be deferred until death.These are the two parts of the "total " Medicaid that is to be recovered upon death.

The federal statute does - not provide for any reimbursement to the State prior to the creation of the trust fund. Indeed, if reimbursement is made for Medicaid provided prior to the creation of the trust fund, then it becomes a mathematical impossibility to reimburse the State for the total lifetime of medical assistance again upon the death of the beneficiary. Hence, the "literal text" of the statute requires that a total lifetime of medical assistance be reimbursed only once and at that "payback" is at the death of the Trust beneficiary. Pursuant to Brogan, this Court should follow the standard established by the Congress and not the standard established by the New York State Court of Appeals.

The Brogan test amplified the Second Circuit's statutory interpretation test of using dictionary definitions of statutory words to interpret the federal Medicaid statute. In Greenery Rehabilitation Group v. Hammon, 150 F. 3d 226 (2d Cir. 1998), the Second Circuit reversed the trial Court's interpretation of a Medicaid statute that provided Medicaid benefits to undocumented aliens who were suffering from "emergency medical conditions". The Court interpreted the statutory definition of an "emergency medical condition" provided in 42 U.S.C. §1396b(v)(3), based on its reading of the Webster's definition of an "emergency" which conveyed the "commonly understood definition" of the word emergency. The Court then reviewed the

dictionary definition of the word "acute" and "immediate" in interpreting the statute. "In sum, the statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and short-physical injuries or illnesses that require immediate treatment to prevent further harm." Id. at. 231.

In Luyando v. Grinker, 8 F. 3d 948 (2d Cir. 1993), the Second Circuit did not use a dictionary definition test, but applied the Chevron standards of deferring to the federal agency's interpretation, and reversed the trial judge. "But, while we can easily see how the Secretary might have reasonably chosen to interpret the statute to permit pass throughs for months in which payments were not received in order to mitigate hardship, we cannot say that such interpretation was compelled or the Secretary's contrary interpretation as embodied in §302.51 (b)(l) was an impermissible, and hence invalid, construction of the statute." Id. at 952.

Should this Court find the literal text analysis inapplicable, the Court may apply the second prong of the Chevron test absent duly promulgated regulations. The Court could then rely upon the "Richardson" and "Mc Adoo" interpretations of the remedial trust statute. These federal officials did not take the position of the New York State Court of Appeals that the entire lien must be paid as a priority. Rather, the prior medical expenses would be paid only from that portion of the settlement proceeds that were intended to pay for past medical expenses. See Appendices E, F, G, and H. In Callahan, by application of an "allocation" standard, the trial court allocated no portion of the settlement proceeds for past medical expenses and allocated all of the settlement proceeds for Frances' pain and suffering.

On April 23, 1999, the Second Circuit adopted the reasoning of the New York State Court of Appeals" Calvanese-Callahan holding in Sullivan v. County of Suffolk, 1 F. Supp. 186 (E.D. N.Y. 1998),.aff'd, 174 F.3d 282, n. 5 (2d Cir. 1999). The Court is advised that appellant Sullivan will be filing a petition for a writ of certiorari and will make the same arguments as made by petitioner Callahan.

In summary, this Court should grant the petition and apply the Brogan "literal text" standard when it interprets the intent of Congress. 42 U.S.C. §1396p(d)(4)(A) authorized disabled individuals to establish trusts so long as upon their death, the trust would pay back the state for an amount not to exceed the Medicaid total benefits expended during lifetime. If deferral of any lien was not the intent of Congress, then as per Brogan, it is for Congress, not the New York State Court of Appeals, to change the statute.

POINT III
THE BROGAN STANDARD SHOULD BE APPLIED TO THE FEDERAL ASSIGNMENT STATUTE THAT REQUIRES THE MEDICAID AGENCIES TO SUE THE DEFENDANTS, NOT THE PLAINTIFFS, IN ORDER TO RECOVER PAST MEDICAL EXPENSES.

The federal assignment statute authorizes the Medicaid agencies to pursue third parties directly who have caused injuries that result in Medicaid expenditures. Even if satisfaction of the Medicaid lien is deferred until the death of the beneficiary of a payback trust, the agencies may seek recovery from the tortfeasors directly.

Congress intended that the State Medicaid agencies act upon the Medicaid recipients' assignments of their causes of action to recover Medicaid costs from the persons determined to be liable for those expenditures. 42 U.S.C. §1396k. By application of the Brogan "literal text" standard to the Medicaid assignment statute, Congress clearly intended that the Medicaid agencies pursue the defendants and collect their past medical expenses from the defendants.

The petitioner makes the same Brogan "literal text" argument to the federal assignment statute that is made to the OBRA 1993 Trust statute. The federal assignment statute is a collection statute and - not a lien statute. By ignoring the "literal text" of the federal assignment statute, the New York State Court of Appeals ratified the Medicaid agency's fateful decision not to sue the defendants directly based on the assigned cause of

action for medical expenses.

A. The Federal Assignment and Collection statutes

The legislative history of the Medicaid assignment statute, 42 U.S.C. §1396k, supports the petitioner's argument that Congress intended that the Medicaid agencies pursue a 100% recovery of their claims against third parties legally liable to provide for medical care borne by the Medicaid program by filing an independent cause of action against the defendants. In 1986 Congress added subdivision (a)(l)(C) to Section 1396k, which provides that a Medicaid recipient is required only to assist the Medicaid agency: "(T)o cooperate with the State in identifying and providing information to assist the State in pursuing any third party who may be liable to pay for care and services available under the plan." Emphasis Added. Id.

In adopting this provision, Congress determined that it intended that the states, not the Medicaid recipients, pursue legally liable third parties. Medicaid recipients were not required to prosecute on behalf of the state, but merely to assist with the State in its pursuit of third party resources:

> The conference agreement follows the Senate amendment with a modification clarifying that individuals are required to identify to the extent they are able, potentially liable insurers and other third parties, and to provide information to assist the States in pursuing the collections (of third party reimbursement) themselves. Pursuit is the responsibility of the provider or the State as provided elsewhere in this section. Consolidated Omnibus Budget Reconciliation Act of 1985, H.R. Conf. Rep. No. 453, at 544-45. Emphasis Added.

In Calvanese-Callahan, the New York State Court of Appeals did not discuss the federal statutory duty of the Medicaid agencies to pursue the defendants, not the plaintiffs, in order to collect monies to reimburse the Medicaid agencies for past medical expenses. As with the federal Medicaid anti-lien statute, this provision of the complicated federal-state Medicaid program was simply ignored by the Court because it ran counter to the

State public assistance lien statute.

The Secretary of Health and Human Services' own duly promulgated assignment regulations clarify the mandate that the agency pursue recovery directly against the tortfeasor or other legally liable third party. First, the regulations establish the Medicaid recipient's duty to identify and provide information to the Medicaid agency which had the duty to pursue the potentially liable third party. 42 C.F.R. §433.137 (b) (1) provides that:

> A state plan must provide that ....(t)he requirements of §§ 433.145 through 433.148 are met for assignment rights to benefits... and cooperation in identifying and providing information to assist the State in pursuing any liable third parties. Emphasis Added.

The Medicaid recipient's cooperation duties do not include a duty to prosecute independently the third party on the state's behalf. Rather the Medicaid recipient's duty is to cooperate with the Medicaid agency and the Secretary prescribed the cooperation standard duties of the Medicaid recipient by the duly promulgated HHS regulations:

> B). Essentials of cooperation. As part of cooperation, the agency may require an individual to:
> 1) Appear at a State or local office designated by the agency to provide information or evidence relevant to the case;
> 2) Appear as a witness at a court or other proceeding;
> 3) Provide information, or attest to lack of information, under penalty of perjury;
> 4). Pay to the agency any support or medical care funds received that are covered by the assignment of rights;
> 5) Take any other reasonable steps to assist in establishing a paternity and securing medical support and payments, and in identifying and providing information to assist the state in pursuing any liable third party. 42 C.F.R. 433.137 (b).

The assignment regulatory scheme also establishes standards upon which the State is to make its decision whether to pursue its assignment right against a liable third party. 42 CFR §433.139 (d)(3) provides that "(r)eimbursement must be sought unless the agency determines that recovery would not be cost effective in accordance with paragraph (f) of this section." Paragraph (f) establishes standards for when the State agencies are to secure reimbursement:

> 1) An agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover will be greater than the cost of recovery. Recovery efforts may be suspended or terminated only if they are not cost effective.
>
> 2). The State Plan must specify the threshold amount or other guideline that the agency uses in determining whether to seek recovery from a liable third party, or describe the process by which the agency determines that seeking recovery of reimbursement would not be cost effective.
>
> 3. The State plan must also specify the dollar amount or the period of time for which it will accumulate billings with respect to a particular liable third party in making the decision whether to seek recovery of reimbursement. Emphasis Added. Id.

Thus, pursuant to the Secretary's federal assignment regulations, the Suffolk County DSS, on behalf of the State agency, had a duty to weigh all factors to determine whether it was cost effective to sue the defendants. In this case, the Medicaid agency determined - not to initiate an independent cause of action against the defendants to recover medical expenses that had been paid by the Medicaid program based on the assignment made by the Medicaid recipient. The State of New York applied the assignment statute and recovered 25 billion dollars from the tobacco company defendants with assigned causes of action. The State of New York secured this spectacular recovery because they

performed the statutory duty that Congress intended that they perform: sue the defendants.

Indeed, these assignment suits have been so successful that there is now a dispute as to the share of the recovery the States will return to the federal government. See U .S. Wants a Cut of Tobacco Settlements: Administration Seeks Medicaid Repayments From State Lawsuits, N.Y Times 11-19-97. R. 368. The States, emboldened by their success, are arguing that they are not now bound by the assignment statute such that the States will return the federal government's share of the Medical expenses to the federal government. Hence, the importance of petitioner's argument that the Court apply the "literal text" standard to the assignment statute.

B. The difference between an assignment and the use of a lien based on a subrogation theory

The State Medicaid agency's defense of the lien it placed on the monies already received by the plaintiff highlights the critical distinction between assignment and subrogation. An assignment creates an immediate transfer of interest in the property. The agency can not put a lien on the property that it already owns.

In contrast, by subrogation, a lien may be imposed as a charge upon the property owned by another. See Springer v. J.R. Clark Co. 138 F. 2d 722 (8th Cir. 1943). The agency can put a lien on its own propert only if that property is in the custody of a third party. However, pursuant to the Medicaid anti-lien statute, it cannot put a lien on the property of a Medicaid recipient as long as Medicaid was correctly provided. 42 U.S.C. § 1396 p(b)(l).

The statutory assignment under section 1396k results in the entire transfer of the assignor-Medicaid recipient's interest in the property to the assignee-Medicaid agency. In Broadcast Music. Inc. v. Hirsch, 104 F. 3d 1163 (9th Cir. 1997), the Ninth Circuit interpreted New York law and provided a definition of what an assignment constitutes: 1) a complete transfer of control over the property, 2) leaving the assignor no authority to collect, and 3) no power to revoke the transfer.

Petitioner Callahan assigned to the Medicaid agency her

legal right to recover medical expenses from the defendants. With the assignment, this became the Medicaid's cause of action, not Frances' cause of action. Frances never relinquished her own right to recover from the defendants an amount of monies to pay for their pain and suffering, loss of future earnings, and future needs. Thus, when in 1991 monies were paid by the defendants to plaintiff Frances Callahan, those monies were to pay for pain and suffering. As adjudicated by the trial court, these monies were not intended for medical expenses received by the plaintiff. The trial court discharged the Medicaid lien. Appendix B.

C. The deferral of the "payback" until death is not a windfall to the OBRA trust beneficiary.

In OBRA 1993, Congress did not provide a windfall for the under 65 disabled Medicaid recipient. A special rule applies to the disabled person's OBRA 1993 Trust. The general Medicaid lien statute limits estate recovery only for Medicaid provided - after the age of 55. No recovery is allowed for Medicaid provided prior to the age of 55. 42 U.S.C. §1396p(b)(1)(B); N.Y. Soc. Serv. Law §369(2)(b)(1)(B).

In contrast, to the general estate recovery rule, Congress created an exception for 1993 disabled beneficiaries of OBRA 1993 Trusts. Upon the death of the beneficiary, the state will be paid back for Medical assistance even if provided prior to age 55 and even if the source of the trust's funds is not causally related to an injury causing Medicaid benefits. Such total reimbursement is directed even if the assets placed into the trust fund are inherited moneys or moneys gifted outright to a disabled individual. See 42 U.S.C. §1396p(d)(4)(A) and N.Y. Soc. Ser. L. §366(2)(b)(2)(iii)(A).

D. The deferral until death of recovery of the lien is harmonious with the Medicaid enabling statute as it exnands the agency's right of recovery.

Federal law mandates that each state comply with the provisions of the Social Security Act with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trust funds. 42 U.S.C. §1396a(a)(18).

Deferring reimbursement to the government until the death of the disabled tort victim does not in any way abrogate the State's responsibility and ability to pursue third parties liable to pay for medical treatment previously paid by Medicaid. Pursuant to statute, such legally liable third parties include health insurers, group health plans, service benefit plans, and health maintenance organizations. 42 U.S.C. §1396a(a)(25)(A). These arguably include tortfeasors only who have been found legally liable to have caused the injury that necessitated the medical treatment paid by the Medicaid program. Thus, the provision whereby the total Medicaid lien is deferred until death is harmonious with the duty of the State Medicaid agencies to independently pursue third parties liable for medical expenses.

In the case of Frances Callahan, no liability was found as the case was settled. Hence, the inaction by state in not pursuing the tortfeasor resulted in no finding of legal liability. The decision of the State not to pursue the defendants to recover on its assigned cause of action was the decision of the State, not of Frances Callahan.

Thus, the State's duty to pursue third parties liable for the payment of medical expenses remains unaltered by the pay back trust legislation. The establishment of the trust fund alters only the timing of the reimbursement, not the duty. The federal assignment statute is harmonious with the pay back trust statute. Indeed, the federal statute eases recovery for the government, as the State need not pursue these third parties itself, as the Trustee must notify the State upon the death of the beneficiary and make reimbursement directly to the State.

The State's residuary interests in the SNTs are also not at risk if the State enforces the State's own statute. When enacting the OBRA 1993 compliance State statute, the New York State Legislature provided legal standing to the Medicaid agency to sue a Trustee who violates the terms of the Trust. Executive Law §63. The duty of the Medicaid agency to sue the Trustee if the residuary interest is at risk is unmistakably clear. 18 NYCRR 360-4.5 (b)(5)(iv). There are also explicit standards controlling the Trustee's distribution of any Trust funds. 18 NYCRR 360-4.5 (b)(5)(iii). Thus, the standards upon which to determine whether

the Trustee has breached his fiduciary duty to the State's residuary claim are clearly established.

In summary, the petitioner argues that the New York State Court of Appeals' erred by not applying the "literal text" standard to the federal assignment statute. The petitioner respectfully submits that if this court applies the "literal text" standard to the assignment statute, it should conclude that the deference until death standard is the standard that Congress intended because the agency has its own remedy to secure 100% of its medical expenses by suing the defendants directly .

CONCLUSION

The Callahan decision violated the Supremacy Clause by not deferring the satisfaction of a Medicaid lien. By applying a state lien statute in such a way as to allow subrogation by the agency to the entire lawsuit recovery, whether or not intend to compensate the plaintiff for past medical expenses, the State lien law is more restrictive than the federal Medicaid statutes. The literal text of the federal trust and assignment statutes does not support the conclusion reached by the Court of Appeals in which Frances Callahan will retain no benefit from the lawsuit.

For the above stated reasons, the petition for a writ of certiorari should be granted.

_____

Charles Robert, Esq.

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 55
Robin Krakower Calvanese,
Appellant,
v.
Anthony J. Calvanese, et al.,
Defendants,

This opinion is uncorrected and subject to revision before publication in the New York Reports.

County of Westchester,
Nonparty Respondent.

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2 No. 59
in the Matter of Frances
Callahan.
Suffolk County Department of
Social Services,
Respondent,
Patricia Callahan,
Appellant.

No. 55:
Robert Kruger, for appellant.
Alan D. Scheinkman, for nonparty respondent.
New York State Department of Health, amicus curiae

No. 59:
Charles Robert, for appellant.
Paul G. Costello, for respondent
NYSARC, Inc., amicus curiae

KAYE, CHIEF JUDGE:

In Cricchio v Pennisi (90 NY2d 296), this Court held that the Department of Social Services is entitled to satisfy a Medicaid lien placed on the proceeds of a personal injury settlement pursuant to Social Services Law § 104-b before a plaintiff may transfer those funds to a supplemental needs trust.[2] The appeals now before us present a question left open in Cricchio: is the entire amount of a personal injury settlement available to satisfy a Medicaid lien, or only that portion of the settlement specifically allocated to past medical expenses?

The relevant facts of these cases may be stated briefly. Appellants received Medicaid benefits for injuries they suffered allegedly due to the negligence of third parties. They commenced personal injury actions against the third parties, which eventually settled. Even though a Medicaid lien was placed on both settlements, neither provided for any payment to satisfy the liens. Instead, the net settlement proceeds were allocated to appellants' pain and suffering, and Supreme Court approved the transfer of those funds to supplemental needs trusts for appellants' benefit.

In both cases, the Appellate Division reversed the Supreme Court orders establishing the supplemental needs trusts. Reasoning that "[n]one of the assignment, subrogation, and recoupment provisions * * * limit the right of recovery by DSS to that portion of the settlement proceeds intended to compensate the plaintiff for past medical expenses," the Appellate Division held that all settlement proceeds are available to satisfy a Medicaid lien, and

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[2]In 1993, the New York State Legislature authorized the creation of supplemental needs trusts for the benefit of persons with severe and chronic or persistent disabilities (see, EPTL 7-1.12). The purpose of such trusts is "to meet the supplemental needs of persons with disabilities whose basic needs are expected to be met, in large part, through government benefits or assistance programs" (L 1993, ch 433, § 1). Funds placed in a supplemental needs trust are not considered "available" resources for purposes of assessing the beneficiary's eligibility for Medicaid benefits, but the trust must grant the State a remainder interest in the trust assets existing at the time of the beneficiary's death, up to the amount of all public assistance provided (see, Social Services Law § 366[2][b][2][iii]).

that appellants could transfer settlement funds to a supplemental needs trust only after the liens were paid (Calvanese v Calvanese, 250 AD2d 564, 565; see also, Matter of Callahan, 254 AD2d __). We agree, and accordingly affirm in both cases.

Medicaid is a jointly funded Federal and State program that pays for necessary medical care of qualifying indigent persons (see, 42 USC § 1396 et seq.; Social Services Law § 363 et seq.). In order to contain program costs and ensure that Medicaid remains the "payor of last resort" (S Rep No. 146, 99th Cong, 2d Sess 1, 312, reprinted in 1986 US Code Cong & Admin News 42, 279), States must "take all reasonable measures to ascertain the legal liability of third parties * * * to pay for care and services available under the plan," and seek reimbursement from them (42 USC § 1396a [25][A], [B]). Federal law also requires Medicaid recipients to "cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan," unless good cause exists for the refusal to cooperate (42 USC § 1396k[a][1][C]; see also, 42 CFR §433.145[3]).

Such cooperation requires Medicaid applicants to assign to the State the right to seek reimbursement from any third party up to the amount of medical assistance paid (42 USC § 1396k[a][1][A]; Social Services Law § 366[4][h][1]; 18 NYCRR 360-7.4[a][4]). In New York, as a corollary to this assignment, the local social services district is subrogated, to the extent of its expenditures for medical care furnished, to any rights a Medicaid recipient may have to third party reimbursement (Social Services Law § 367ûa[2][b]; 18 NYCRR 360-7.4[a][6]). Pursuant to this assignment and subrogation scheme, the Department "obtains all of the rights that the recipient has as against the third party to recover for medical expenses, including the ability to immediately pursue those claims against the third party" (Cricchio v Pennisi, supra, 90 NY2d, at 307).

As an alternative to suing the responsible third party directly, the Department may pursue reimbursement indirectly by placing a lien on personal injury suits brought by a Medicaid recipient against the responsible party (see, Social Services Law

§ 104-b). A Medicaid lien "shall attach to any verdict, decision, decree, judgment, award or final order in any suit, action or proceeding in any court or administrative tribunal of this state respecting such injuries, as well as the proceeds of any settlement thereof," and continues until discharged by the public welfare official (Social Services Law § 104-b[3], [7]). Because section 104-b "is purely procedural," it does not alter the agency's substantive right to recover the amount it has expended on behalf of a Medicaid recipient, and the agency's right to recover is the same whether it sues directly or uses a lien (Baker v Sterling, 39 NY2d 397, 405).

Pitted against the Department's right to reimbursement in these appeals is appellants' desire to place all of their settlement proceeds into supplemental needs trusts. This Court addressed the relationship between supplemental needs trusts and Medicaid liens in Cricchio v Pennisi (90 NY2d 296, supra). The question before us was whether a Medicaid lien placed on the proceeds of a personal injury settlement must be satisfied before those funds could be transferred to a supplemental needs trust. After reviewing the Federal and State assignment and subrogation scheme, we answered in the affirmative. In so doing, the Court left open the issue of what portion of the settlement was available to satisfy the lien:

> "Given that the parties did not present any arguments to this Court concerning whether the entire amount of the personal injury settlement or only that portion attributable to past medical expenses is available to satisfy the lien, we do not pass on the question, which must be addressed in the first instance by the court on remittal" (Cricchio v Pennisi, supra, 90 NY2d, at 309-310).

That open question is now before us.

Appellants argue that only the settlement proceeds specifically allocated to past medical expenses should be available to satisfy the Medicaid lien. Nowhere in the elaborate statutory scheme governing this area of the law, however, is the agency's right of recovery restricted in this manner. A State that has furnished Medicaid acquires the rights of recipients "to payment by any other party for such health care items or services," and must "retain[]" from the recovery an amount "as is necessary to

reimburse it for medical assistance payments made on behalf of an individual" (42 USC § 1396a[a][25][H]; § 1396k[b]).

New York's assignment, subrogation and lien provisions effectuate these Federal mandates by imbuing the Department with broad authority to pursue any amount of third party reimbursement to which appellants are entitled. As a condition of eligibility for Medicaid, all applicants and recipients must "assign to the appropriate social services official or the department * * * any benefits which are available to him or her individually from any third party for care or other medical benefits available under this title" (Social Services Law § 366[4][h][1] [emphasis added]; see also, 18 NYCRR 360-7.4[a][4]). Once the Department has furnished Medicaid assistance to an applicant or recipient, it is subrogated to the extent of the expenditures it has made "to any rights such person may have to * * * third party reimbursement" (Social Services Law § 367-a[2][b] [emphasis added]; see also, 18 NYCRR 360-7.4[a][6]).

The Department's ability to enforce its right to reimbursement with a lien is correspondingly broad. If any Medicaid recipient has a right of action "on account of any personal injuries suffered by such recipient," the Department has a lien "for such amount as may be fixed by the public welfare official" up to the amount it has expended (Social Services Law § 104-b[1]). Appellants' proposal that courts -- or Medicaid recipients acting in conjunction with responsible third parties -- be allowed to compromise Medicaid liens by allocating settlements to specific categories of damages is contrary to statutory mandate. Once a Medicaid lien is in effect, only the local public welfare official may release and discharge it, and "no release, payment, discharge or satisfaction of any * * * claim, demand, right of action, suit or counterclaim shall be valid or effective against such lien" (Social Services Law § 104-b[7]).

In light of the Department's broad statutory obligation to seek reimbursement from responsible third parties, appellants present no justification for circumscribing the Department's recovery from settlement funds. The allocation of funds in the manner that appellants urge would divert available third-party resources from the Department to a Medicaid recipient's

supplemental needs trust. This would weaken the assignment and subrogation provisions as well as the priority assigned to Medicaid liens, results that would jeopardize the ultimate goal of Medicaid -- that the program be the payor of last resort (Matter of Costello [Stark] v Geiser, 85 NY2d 103, 106). It would also create an anomalous situation in which Medicaid applicants could be disqualified from eligibility for financial resources that include prior personal injury settlements allocated to pain and suffering, but Medicaid recipients could shield such funds from recoupment by the Department after having received significant public assistance.

Appellants argue that, notwithstanding these concerns, the Appellate Division erred in not applying the "equity standard" of Matter of Costello [Stark] v Geiser (85 NY2d 103, supra). Appellants' reliance on Geiser is misplaced. At issue in that case was the amount of reimbursement that the Department could seek from a responsible third party, not the source of the funds available for the reimbursement. In Geiser, the Court concluded that the Department is entitled to reimbursement only for the actual costs of the medical services provided, and not for "such statutory Medicaid subsidies characterized as bad debt and charity surcharges" (id., at 105). This determination was based on the statutory foundation for the Department's subrogation, as well as the nature of subrogation. Because "subrogation is wholly dependent on the subrogor's claim against the third party," the Department could not recover an amount greater than the Medicaid recipient could have recouped had she paid for the medical services herself. That amount would not have included the Medicaid surcharges (id., at 109). Furthermore, the Department's subrogation rights were limited by statute to the "medical care furnished," an amount that does not include the bad debt and charity allowances (Social Services Law § 367-a[2][b]).

The Court further noted that "[e]quity should not countenance Social Services Law § 367-a(2)(b) being used * * * to recoup for the public purse from a private citizen the additional public charge component of a medical assistance payment" (Matter of Costello [Stark] v Geiser, supra, 85 NY2d, at 110). Considering "the particular relationship of parties and nature of

controversy" in these cases, appellants' argument that an "equity standard" of subrogation shields portions of settlements from Medicaid liens is meritless (id., at 109). There is no claim in these cases that the Department seeks reimbursement for an amount greater than appellants' actual medical costs. Thus, this is not a situation in which the Department may inequitably recover more from a responsible party than the Medicaid recipient could have. Nor can we say, in light of the broad statutory mandates requiring that the Department seek reimbursement from responsible third parties, that equity "should not countenance" the Department's full recovery of its expenditures before appellants -- who have received, and continue to receive, significant amounts of public assistance -- may place settlement funds into a trust for their own benefit (id., at 110).

Appellants' reliance on Baker v Sterling (39 NY2d 397, supra) is similarly misplaced. In Baker, the Department placed a lien on a personal injury suit brought by a plaintiff who received Medicaid assistance when she was under the age of 21. The Department's right of recovery in such a situation is governed by Social Services Law § 104(2), which provides:

> "No right of action shall accrue against a person under twenty-one years of age by reason of the assistance or care granted to him unless at the time it was granted the person was possessed of money and property in excess of his reasonable requirements, taking into account his maintenance, education, medical care and any other factors applicable to his condition."

The Court concluded that an award for personal injuries cannot be "in excess" of the recipient's requirements, since it merely compensates the recipient for a loss. In contrast, the medical expenses paid by the State involved no loss to the recipient, so recovery of them would be "excess." Thus, relying on Social Services Law § 104(2), the Court held that when a Medicaid recipient is younger than 21, only the portion of a settlement allocated to medical expenses is subject to recovery by the Department. Here, however, "the right to recover from responsible third parties * * * is not derived from section 104, but rather from the assignment, subrogation, and recoupment provisions created by 42 USC §§ 1396a and 1396k, and Social Services Law §

366(4)(h)(1) and § 367-a(2)(b). Accordingly, any limitations found in section 104 * * * are not relevant here" (Cricchio v Pennisi, supra, 90 NY2d, at 308, n 4).

Finally, appellants contend that allowing the Department to satisfy a Medicaid lien from all settlement proceeds will, in the long run, actually decrease recovery on Medicaid liens. They envision a scenario in which Medicaid recipients will have no incentive to settle weak claims for an amount less than or equal to the amount of the Medicaid lien, forcing such cases to trial, where there may well be no recovery for either plaintiffs or the Department. That argument ignores the public welfare official's powers both to fix the amount of the lien and to release and discharge it (see, Social Services Law § 104-b[1], [7]). In order to facilitate settlement, the agency may agree to reduce the amount it will accept in satisfaction of its lien -- whether to ensure that the value of the lien is not greater than defendants are willing to settle for, or simply to ensure that a settlement will yield a plaintiff additional compensation beyond having medical expenses paid by the State. This ability to settle, however, does not affect the agency's entitlement to full recovery when sufficient funds are made available by a responsible third party. To conclude otherwise would be to jeopardize Medicaid's status as a "payor of last resort," and to ignore limits on public resources available to fund the program.

Appellants' remaining arguments are without merit.

Accordingly, in both cases, the order of the Appellate Division should be affirmed, without costs.

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Nos. 55 & 59: Order affirmed, without costs. Opinion by Chief Judge Kaye. Judges Bellacosa, Smith, Levine, Ciparick, and Wesley concur. Judge Rosenblatt took no part.

Decided April 6, 1999

APPENDIX B

At an IAS Term, Part 5 of the Supreme Court of the State of New York, held in and for the County of Suffolk, at 235 Griffing Avenue, Riverhead, New York 11901, on the __ day of , 1991.

PRESENT:

Hon. Robert W. Doyle
Justice.

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PATRICIA CALLAHAN, as Mother and Natural Guardian of FRANCES CALLAHAN, an infant over the age of fourteen (14) years,

Plaintiff,

-against-

GOOD SAMARITAN HOSPITAL, FRED W. GRELLO, THOMAS P. McMANUS, and MARIE ZIPF HARRINGTON, as Executrix of the Estate of JOSEPH HARRINGTON, Deceased,

Index No.:17307/85

Defendants. 87-00947 MM

----------X

UPON reading and filing the annexed petition of PATRICIA CALLAHAN, sworn to the 23rd day of May, 1991 and the exhibits annexed thereto; the Affirmation of Robert G. Harley, Esq., dated May 31, 1991 and the exhibits attached thereto; the Affirmation of Margaret Ann Bomba , Esq., dated May 30, 1991; and upon the pleadings and proceedings heretofore had herein; and it appearing that the plaintiff FRANCES CALLAHAN is 24 years if age, having been born on September 14, 1966; and that PATRICIA CALLAHAN was appointed

Committee fir the person and property of plaintiff FRANCES CALLAHAN by Order of Hon. Robert L. Nahman, a Justice of te Supreme Court, Queens County, on August 6, 1991; and the appearance if plaintiff having been waived; and it appearing to the satisfaction of this court that the lien of the Suffolk County Department of Social Services against FRANCES CALLAHAN should be discharged; and the offer of settlement in the amount of $375,000.00 by all defendants consisting of a $50,000.00 offer by defendant GOOD SAMARITAN HOSPITAL, $12,500.00 by DR. FRED GRELLO , $12,500.00 by DR. THOMAS McMANUS and $300,000.00 as an allowance in the liquidation proceedings of Professional Insurance Company, the carrier for JOSEPH P. HARRINGTON, Deceased, to be paid pursuant to Article 76 of the Insurance Law of the State of New York, is fair and reasonable;

NOW on motion of Harley & Browne, attorneys for the plaintiff/petitioner, it is hereby:

ORDERED, that the lien of the Suffolk County Department of Social Services against FRANCES CALLAHAN be and the same is hereby discharged and dissolved; and it is further

ORDERED, that PATRICIA CALLAHAN as parent and Committee of the plaintiff FRANCES CALLAHAN, be, and she hereby is, authorized to enter into and accept a compromise of the cause of action herein upon compliance with the following terms of this Order; and it is further

ORDERED, that the settlement proceeds be paid within thirty (30) day of the signing of this Order and be allocated as follows:

That defendant GOOD SAMARITAN HOSPITAL pay the sum of $50,000.00 to be distributed as follows:

$7,732.50 to Harley & Browne as and for reimbursement of expense incurred in the prosecution of this action; and

$27,728.33 to the Committee of plaintiff Frances Callahan; and

$14,539.17 to Harley & Brown as and for partial payment of their legal fee for services rendered in the prosecution of this action, within (30) days of the execution and filing of a dismissal

with prejudice to all defendants; and

That the defendant FRED W. GRELLO, M.D., pay the sum of $12,5000.00 to be distributed as follows:

$4,166.67 to Harley & Browne, as and for partial payment of their legal fee for services rendered in the prosecution of this action, within (30) days of the execution and filing for a dismissal with prejudice to all defendants; and

$8,333.33 to the Committee of plaintiff Frances Callahan; and

That defendant THOMAS P. McMANUS, M.D., pay the sum of $12,5000.00 to be distributed as follows:

$4,166.67 to Harley & Browne as and for partial payment of their legal fee for services rendered in the prosecution of this action, within thirty (30) days of the execution and filing of a dismissal with prejudice to all defendants; and

$8,333.33 to the Committee of plaintiff Frances Callahan; and it is further

ORDERED, that the State of New York Insurance Department, Liquidation Bureau, in the liquidation proceeding of Processional Insurance Company, under Claim No. P-MAL2611MF, Claim of MARIE ZIPF HARRINGTON, as executrix of the Estate of Joseph Harrington, pay the sum of $300,000.00 as follows:

$100,000.00 to Harley & Browne as and for their legal fee for services rendered in the prosecution of this action, within thirty (30) days of the execution and filing of a dismissal with prejudice to all defendants; and

$2000,000.00 to the Committee of plaintiff Frances Callahan; and it is further

ORDERED, that all of the proceeds of the settlement be and hereby are allocated to compensate the plaintiff Frances Callahan for her pain and suffering; and it is further

ORDERED, that the aforementioned shall be in full settlement of this law suit against all defendants; and it is further

ORDERED that, conditioned upon compliance with the terms and provisions of this Order, Patricia Callahan as parent and Committee of plaintiff Frances Callahan be, and she hereby is, authorized and empowered to execute a general release and all

other papers necessary to effect this settlement.

ENTER

_____

J.S.C.

APPENDIX C

At an IAS Part 20 of the Supreme Court of the State of New York, held in and for the County of Queens, at the Courthouse, 88-11 Sutphin Blvd, Jamaica, New York on the 10 day of May 1996

PRESENT:

HON. EDWIN KASSOFF

Justice.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In the Matter of the Application of

PATRICIA CALLAHAN

ORDER AND JUDGMENT

For the Appointment of a Guardian for

APPOINTING
PATRICIA CALLAHAN

FRANCES CALLAHAN

FOR PROPERTY
MANAGEMENT AND
PERSONAL NEEDS

An Alleged Incapacitated Person

Index No.: 09817/91

An order having been duly made herein at an IAS Part 20 of this Court on the 4th day of April, 1995 directing that FRANCES CALLAHAN, the Alleged Incapacitated Person, The Commissioner of the Suffolk County Department of Social Services, Gary Darche, Esq., Robert Fine, Esq. Theodore Callahan, Theodore Callahan, Jr., Kelly Ann Callahan Dunlop,

Charles Houston, Gerald W. Kaplan, Esq. and the Attorney General of the State of New York show cause why a Guardian for Property Management and for Personal Needs should not be appointed for FRANCES CALLAHAN and granting other relief and Wyatt Gibbons, Esq. having been appointed as Court evaluator and having duly appeared as same, and Robert, Lerner & Robert, by Joan Lenskv Robert, Esq. having appeared for the petitioner herein, and the Suffolk County Attorney by Vinicio D'Arquea, Esq. having appeared for the Commissioner of the Suffolk County Department of Social Services and Joseph Traver, Esq. having appeared for the Mental Hygiene Legal Service and this matter having regularly come on for hearing on the 11th day of May, 1995 and the parties having adduced their proof and it appearing therefrom to the satisfaction of this court that the alleged incapacitated person is likely to suffer harm because the alleged incapacitated person is unable to provide for personal needs and property management by reason of her functional limitations, and the court having made the findings required by Section 81.15 of the Mental Hygiene Law in a decision made on the record on the 11th day of May, 1995, and upon all the pleadings and proceedings heretofore head herein, and due deliberation having been had, and upon the Supplemental Needs Trust Fund for FRANCES CALLAHAN annexed hereto, on motion of Robert Lemer & Robert, attorneys for Petitioner, it is

ORDERED AND ADJUDGED, that FRANCES CALLAHAN be and hereby is determined to be a person requiring the appointment of a Guardian for Personal Needs and Property Management, and that the Committee pursuant to Article 78 of the Mental Hygiene Law be modified, as the court has found that said incapacitated person is likely to suffer harm because of her inability to provide for personal needs and property management and that she is unable to fully realize the consequences of such inability. and it is further

ORDERED AND ADJUDGED, that PATRICIA CALLAHAN, of 1031 Ocean Avenue, Bay Shore, New York 11706, be and he hereby is appointed Guardian for personal needs and for property management of FRANCES CALLAHAN upon filing with this Court, pursuant to Mental Hygiene Law Section

81.25 a bond in the sum of $269,000.00 with sufficient sureties, conditioned that said Guardian will in all things faithfully discharge the trust imposed herein, obey all directions of the Court in regard to the trust, and make and render a true account of all monies and other properties received by her pursuant to the authority granted herein and in the application thereof, and of all acts performed in the administration of the trust imposed herein, whenever required to do so by the court, and will file the designation required by Section 81.26 of the Mental Hygiene Law: and it is further

ORDERED AND ADJUDGED that pursuant to Section 81.27 of the Mental Hygiene Law, upon the filing of such bond and designation as required by statute a Commission in the due form of law shall be issued by the Clerk of the Court; and it is further

ORDERED AND ADJUDGED, that THEODORE CALLAHAN, JR., of 1031 Ocean Avenue, Bay Shore, New York 11706, and KELLY ANN CALLAHAN DUNLOP, of 415 Spring Hill Road, White Bear Lake, Minnesota 55127 be and they hereby are appointed Standby Co-Guardians for personal needs and for property management of FRANCES CALLAHAN upon filing with this Court, pursuant to Mental Hygiene Law Section 81.25 a bond in a sum to be determined at such time with sufficient sureties, conditioned that said Co-Guardians will in all things faithfully discharge the trust imposed herein, obey all directions of the Court in regard to the trust, and make and render a true account of all monies and other properties received by them pursuant to the authority granted herein and in the application thereof, and of all acts performed in the administration of the trust imposed herein, whenever required to do so by the court, upon their filing lie designation required by Section 81.26 of the Mental Hygiene Law; and it is further

ORDERED AND ADJUDGED that the authority of the Guardian of the Property shall extend to all of the property of the incapacitated person, both real and personal; and it is further

ORDERED AND ADJUDGED that all persons are hereby directed and commanded to deliver to the Guardian of the Property, upon demand and presentation of a certified copy of the

commission, all property of the incapacitated person, of every kind and nature which may be in their possession or under their control; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Guardian for Property Management shall marshal the assets of the Incapacitated Person and place them into a Supplemental Needs Trust Fund for the sole benefit of the Incapacitated Person, said trust fund annexed hereto and which shall become part of this Order and Judgment; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN shall be the Trustee of the Supplemental Needs Trust Fund for FRANCES CALLAHAN; and it is further

ORDERED AND ADJUDGED that upon the death of FRANCES CALLAHAN this Supplemental Needs Trust Fund for FRANCES CALLAHAN shall terminate, and the State shall be reimbursed from the principal and accumulated income in the trust fund for an amount up to the total lifetime medical assistance provided to FRANCES CALLAHAN ; and it is further

ORDERED AND ADJUDGED that repayment of the Medicaid benefits provided to FRANCES CALLAHAN be and the same hereby is deferred until the death of FRANCES CALLAHAN; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Guardian for Property Management of FRANCES CALLAHAN and as Trustee of the Supplemental Needs Trust Fund for FRANCES CALLAHAN may, as consistent with an Application and Short Order of this Court, make reasonable expenditures for the purpose of providing the incapacitated person with necessaries, services, comforts, and supplemental needs as consistent with the annexed Supplemental Needs Trust Fund; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Guardian for Property Management of FRANCES CALLAHAN and as Trustee of the Supplemental Needs Trust Fund for FRANCES CALLAHAN shall invest the trust corpus in investments eligible by law for the investment of trust funds and may dispose of investments so made and reinvest the proceeds as so authorized, Nothing herein contained shall be

deemed to limit the power of the court to approve any investment made without its authorization, or to control the disposition of the property of the incapacitated person or investment or reinvestment of the incapacitated person's funds, or to make a new order respecting investments at any time; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Guardian for Property Management may not alien, mortgage, lease, or otherwise dispose of real property without the special direction of the court obtained upon proceedings taken for that purpose as prescribed in Article 17 of the Real Property Actions and Proceedings Law, provided, however, that without instituting such proceedings, the Guardian for Property Management may, with the authorization of the court, lease real property for a term not exceeding five years and may without further authorization of the court lease a primary residence for the incapacitated person for a term not to exceed three years; and it is further

ORDER AND ADJUDGED that the Guardian for Property Management and Personal Needs shall have the authority to retain counsel, provided that any fees paid to such counsel shall be subject to the approval of the court; and it is further

ORDERED AND ADJUDGED that upon the death of the incapacitated person, the Guardian for Property Management shall have the authority to pay for the reasonable funeral expenses of the incapacitated person; and it is further

ORDERED AND ADJUDGED that upon the death of the incapacitated person, the Guardian for Property Management shall have the authority to pay the bills of the incapacitated person provided the Guardian for Property Management would otherwise have had the right to pay such bills; and it is further

ORDERED AND ADJUDGED that the Guardian for Property Management shall have such authority as may be granted by any statute of the United State of America or the State of New York unless such statute specifically requires the permission of the court before the exercise of the power granted therein; and it is further

ORDERED AND ADJUDGED, that the duration of the

Guardianship for Personal Needs and for Property Management is indefinite and it is further

ORDER: AND ADJUDGED that pursuant to Section 81.20 of the Mental Hygiene Law PATRICIA CALLAHAN, as Guardian for Personal Needs and for Property Management shall:

a. exercise only those powers that the Guardian is authorized to exercise by order of the court;

b. exercise the utmost care and diligence when acting on behalf of the incapacitated person;

c. exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person;

d. visit the incapacitated person not less than four times per year;

e. afford the incapacitated person the greatest amount of independence and self-determination with respect to property management and personal needs in light of FRANCES CALLAHAN's functional level, understanding and appreciation of her functional limitations and personal wishes, preferences and desires with regard to managing the activities of daily living; and it is further

ORDERED AND ADJUDGED that pursuant to Section 81.20 of the Mental Hygiene Law PATRICIA CALLAHAN, as Guardian for Property Management shall:

a. Preserve, protect and account for such property and financial resources faithfully.

b. Determine the appropriate persons to be notified in the event of the death of the incapacitated person, and in the event of the death of the incapacitated person, notify those persons;

c. At the termination of the appointment, deliver such property to the persons legally entitled to it; and ;

d. Perform all other duties required by law; and it is further

ORDERED AND ADJUDGED that to the extent of the net estate available therefor, the Guardian of the Property shall provide for the maintenance, support and personal well-being of the incapacitated person by supplementing her government entitlements and providing services, necessities and comforts

through the annexed Supplemental Needs Trust Fund for FRANCES CALLAHAN; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Committee of FRANCES CALLAHAN be and she hereby is authorized to expend up to $4,000 for a trip to Disney world for FRANCES CALLAHAN in June, 1995, the expenses for which may include the airline tickets for FRANCES CALLAHAN, Patricia Callahan and Theodore Callahan, Jr., hotel accommodations, car rental with handicapped equipment for FRANCES CALLAHAN, and food; and it is further

ORDERED AND ADJUDGED, that PATRICIA CALLAHAN as the Guardian for Personal Needs , shall have the following powers pursuant to Mental Hygiene Law § 81.22 which may be exercised without further Order of this Court:

a. Determine who shall provide personal care or assistance;

b. Consent to or refuse generally accepted routine or major---------- treatment provided that the Guardian for Personal Needs shall make treatment decisions consistent with the findings herein pursuant to Mental Hygiene Law Section 81.15 and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving th person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider;

c. Make decisions regarding social environment and other social aspects of the life of the incapacitated person;

d. the of abode, provided that the choice of abode must be consistent with the findings herein pursuant to Mental Hygiene Law Section 81.15, the existence of and availability of family, friends and social services in the community, the care,

comfort and maintenance, and where appropriate, rehabilitation of the incapacitated person, the needs of those with whom the incapacitated person resides; and provided further that the Guardian for Personal Needs shall have the authority to place the incapacitated person in a group home licensed by the State of New York without further Order of this Court; and it is further

ORDERED AND ADJUDGED, that PATRICIA CALLAHAN as the Guardian for Personal Needs shall have the following powers pursuant to Mental Hygiene Law § 81.21 which may be exercised without further Order of this Court:

a. Marshal the assets of the Incapacitated Person, and to invest and reinvest such assets in a Supplemental Needs Trust Fund for the benefit of FRANCES CALLAHAN , with PATRICIA CALLAHAN as trustee, and to invest and reinvest such assets as would a prudent person of discretion and intelligence in such matters seeking reasonable income and to apply so much of the trust assets as necessary for the benefit of FRANCES CALLAHAN as consistent with a Short Form Order authorized by this Court in accordance with the instructions of the trust fund so as to supplement, rather than supplant government entitlements for which FRANCES CALLAHAN is eligible;

b. To collect all income of the incapacitated person including, but not limited to the Social Security earnings of FRANCES CALLAHAN;

c. To provide for the maintenance and support of the Incapacitated Person by making reasonable expenditures to supplement government entitlements from the trust fund as enumerated in the Short Form Withdrawal Order of the Court;

d. Apply for public and private benefits;

e. authorize access to or release of confidential records;

f. To pay all debts of the Incapacitated Person; and it is further

ORDERED AND ADJUDGED that pursuant to Mental Hygiene Law Section 81.39 no later than ninety days after the issuance of a commission, PATRICIA CALLAHAN as Guardian for FRANCES CALLAHAN shall furnish proof that she has completed a training program approved by the Chief

Administrator of the Courts; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN, as Guardian for Personal Needs and for Property Management, shall file with the Court an initial report in the form prescribed by the Court no later than ninety days after issuance of the Commission to the Guardian and submit proof of completion of the guardian education requirements under Section 81.39 of the Mental Hygiene Law; and it is further

ORDERED AND ADJUDGED that PATRICIA CALLAHAN as Guardian for Personal Needs and for Property Management shall file during the month of May in the Office of the Clerk of the County of Queens, in which the Incapacitated Person last resided before the appointment of a Guardian, an annual report in accordance with the provisions of § 81.3 1 of the Mental Hygiene Law, ; and it is further

ORDERED AND ADJUDGED, that if the annual report sets forth any reason for a change in the powers authorized by the Court, that the Guardian shall make application for such relief on notice: and it is further

ORDERED AND ADJUDGED, that the Guardian shall make the following disbursements from the funds of the incapacitated person:

a) To Robert, Lerner & Robert the sum of $14,000.00 as and for a legal fee for serving as attorneys for the petitioner

b) To Wyatt Gibbons, Esq the sum of $1,900.00 for services rendered as court evaluator; and it is further

ORDERED AND ADJUDGED that the compensation of the Guardian shall be fixed in subsequent orders of this Court; and it is further

ORDERED AND ADJUDGED that pursuant to Section 81.16 (c)(3) of the Mental Hygiene Law, notice of all further proceedings with regard to this matter shall be given to FRANCES CALLAHAN, the Incapacitated Person, to the Administrator of the facility in which FRANCES CALLAHAN resides and to the Commissioner of Suffolk County Department of Social Services; and it is further

ORDERED AND ADJUDGED that pursuant to Section 81.16(e) of the Mental Hygiene Law, the requirement that a copy

of this Order and Judgment shall be personally served upon and read to the incapacitated person by Wyatt Gibbons, Esq be and the same hereby is WAIVED; and it is further

ORDERED AND ADJUDGED that any appointee herein shall comply with Section 35-a of the Judiciary Law and Parts 26 and 36 of the Rules of the Chief Judge of the State of New York, and no fee shall be paid to such appointee until such appointee has filed OCA Form 830 with the Court.

ENTER

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J.S.C

APPENDIX D

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IAS PART 20

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Matter of the application of : PATRICIA CALLAHAN, as Guardian: of the Person and- Property of : FRANCES CALLAHAN	:	Index No. 9817/91
	:	BY. KASSOFF, J.
	:	Dated: April 16, 1998

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In this guardianship proceeding, the guardian sought permission to establish and fund a Supplemental Needs Trust with the proceeds of a Suffolk County personal injury action settlement, without having' to first satisfy the-lien of the Suffolk County Department of Social Services (DSS) . This Court granted the guardian's application relying on the decision of the Second Department in - Cricchio v. Pennisi, 20 AD2d 100. DSS appealed this Court's decision and during the pendency of that appeal the Court of Appeals reversed Cricchio v Pennisi, 90 NY2d 296. Based on the court of Appeals decision in Cricchio, the Appellate Division reversed this Court's decision in this matter and remitted it for a determination of "the portion of the recovery that was intended to Compensate the plaintiff for past medical expenses, and whether the settlement was consciously structured to frustrate the Medicaid lien".

Subsequently, the Court of Appeals amended its decision in Cricchio, to delete the language directing the trial court to determine the portion of the recovery that is intended to compensate the plaintiff for past medical expenses. The Court of Appeals replaced the deleted language with a statement that since the parties did not present any arguments to the court concerning whether the entire amount of the settlement or only that portion attributable to past medical expenses is available to satisfy the lien, this issue must be addressed in the first instance by the

trial court on remittal (Cricchio v Pennisi, 90 NY2d 309-310) . However, no motion was made to the Appellate Division in this case to amend the decision remitting this matter to this court. Thus, the letter of the order of the Appellate Division remitting this matter does not include the issue whether the entire amount of the personal injury settlement or only that portion attributable to past medical expenses is available to satisfy the DSS lien.

In Cricchio v Pennisi, 90 NY2d 296, the Court of Appeals held that a social services lien had to be repaid or satisfied from the proceeds of a Personal injury settlement before the settlement proceeds could be paid into a supplemental needs trust created by the plaintiff, finding that prior to payment the settlement proceeds were assets of the responsible third party as opposed to assets of the plaintiff Medicaid recipient. The Cricchio Court specifically left open the issue of what portion of the recovery should be allocated to pay the lien, the entire recovery or only that portion attributable to past medical expenses.

It is clear that if the DSS lien was for medical assistance rendered to a person under the age of twenty-one an allocation hearing would be necessary (see, McClenehan v Farber, NYLJ Feb. 18, 1998, at 28, col 1, (2nd Dept)) . That is because with such a person, recovery can be sought under Social Services Law 104(2), which provides that the department may recoup its lien to the extent such a person was "possessed of money and property in excess of his reasonable requirements." In Baker v. Sterling, 39 NY2d 397, the Court of Appeals held that the portion of the settlement of an infant's claim which represents a compromise of the claim for medical expenses is subject to the social services lien and can be recovered by the department. Therefore it was necessary to determine what portion of the infant's settlement was attributable to reimbursement for past medical expenses through an allocation hearing.

Here DSS reasons that its right of recoupment: found in Social Services Law 104 (1) is unrestricted and applies to any real or personal property of the person who received assistance. DSS argues that a priority standard applies relying on the analysis of the decision Matter of Ling v. Town of Smithtown,

NYLJ, Jan. 6, 1998, at 35, col 1-3 (Supreme Court Suffolk County, Leis, J.) . Matter of Link, held that the department's right of recoupment was not limited by any New York State statutory provision and that the full amount of the proceeds collected from responsible third party is available to reimburse the department for funds paid on behalf of an adult recipient of social services .

The Plaintiff does not dispute that on its face section 104 provides for unrestricted recovery, but argues that any State statutory provision regarding recovery is subject to limitations on recoupment imposed by the Federal statutes and regulations. In particular, plaintiff asserts that 42 USC 1396a(a) (25) (A) and (B) restrict the State's right of recoupment to that portion of the recovery representing the responsible third party's liability to pay for care and services provided by the department.

However, this court need not address the issue whether the entire amount of the settlement proceeds or only that portion attributable to past medical expenses is available to satisfy the DSS lien since the Appellate Division has directed this Court to conduct an allocation hearing and "determine the portion of the recovery that was intended to compensate the plaintiff for past medical expenses and whether the settlement was consciously structured to frustrate the Medicaid lien." Accordingly, this court must conduct an allocation hearing. The parties are directed to contact the chambers of this Court regarding a date for the allocation hearing. This memorandum constitutes the decision and order of this Court.

....

J.S.C.

APPENDIX E

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
6325 Security Boulevard
Baltimore, MD 21207

Sept. 30, 1993

Ms. Patricia Callahan
1013 Ocean Avenue
Bay Shore, New York 11706

Dear Ms. Callahan:

This is in further response to your letter to Mrs. Clinton which was referred to this agency for review. Please forgive the delay in my reply.

You had asked whether anything could be done, on a Federal level, to permit the creation of special needs trusts for severely handicapped children in a way that, presumably, would not cause them to lose Medicaid. Your daughter, who is disabled as the result of an accident, has received a monetary award. You would like to place the funds in a special needs trust for her benefit, but would also like to be able to use the funds for her benefit, without loss of Medicaid.

Prior to the enactment of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93), a trust such as you describe would, in all likelihood, be counted under Medicaid as an asset to the beneficiary unless it were structured in such a way as to make the funds in the trust unavailable for use by the beneficiary. However, OBRA 93 changes the language of the Medicaid statute to permit the creation of a special needs trust for disabled children without the trust being counted for Medicaid purposes.

Briefly, the new legislation, which applies to any trusts established after August 10, 1993, provides that a trust created by a parent,

Grandparent, guardian, or a court, for a disabled person under age 65, using the assets of the disabled person, will not be counted in determining eligibility for Medicaid. To be noncountable, the trust instrument must also provide that the State will receive any funds remaining in the trust after the person's death, up to the amount of Medicaid benefits paid on behalf of the person.

If these conditions are met, the trust itself is not a countable resource for Medicaid purposes. However, it is important to note hat if funds are actually paid from the trust to or on behalf of the beneficiary, the payments actually made may be counted as income to the beneficiary in determining eligibility for Medicaid. While this does, to a certain extent, limit the beneficiary's use of the trust funds, this new provision of the Medicaid statute is, for the most part, a less restrictive treatment of trusts established for disabled children than was previously in effect.

Sincerely yours,

Sally K. Richardson
Director
Medicaid Bureau

APPENDIX F

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
6325 Security Boulevard
Baltimore, MD 21207

December 30, 1993

Mr. Howard K. Gibbs
Assistant General Counsel
Litigation Division
Human Resources Administration
Office of Revenue and Investigation
66 Leonard Street, 7th Floor
New York, New York 10013

Dear Mr. Gibbs:

I an responding to your letter concerning the allegations made by Sonia Crannage. While we are not in a position to intervene in the matter between New York and Ms. Crannage in the case of Felicia Reyes, I can provide you with information on the Federal role in the Medicaid Program.

Federal law at section 1917(a) of the Social Security Act (the Act) and implementing regulations at 42 CFR 433.36 prohibit a State from imposing liens against the property of an individual prior to his death because of medical assistance paid or to be paid on his behalf under the State plan, excpet in very limited circumstances. It does not appear that any of the circumstances apply in this case.

However, another Federal law at section 1902(a)(25)(a) of the act requires States to ascertain the legal liability of third parties to make payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is or may be liable to pay all or part of the expenditures of medical assistance

furnished under the State plan. Tis includes any property judgment or settlement from a tort or casualty liability claim.. Where such a legal liability exists section 1902 (a)(25)(B) of the Act requires a State to seek reimbursement for medical assistance payment already made.

A Medicaid recipient at the time of application and as a condition of eligibility for Medicaid, assigns to the State his or her rights to payment from any third party and must cooperate with the State in its pursuit of any third party who might be liable for payment as required by section 1912(a)(1) of the Act. Thus, under this provision in Federal law and the implementing regulation at 42 CFR 433.145, the Sate has claim to the amount recovered by the recipient, even though the State may not have been a party to the litigation.

If, under State law, a lien is not being placed upon the Medicaid recipient's property, but rather is being placed upon the tortfeasor's (the defendant in the personal injury litigation) property or upon funds which are set aside to be used in a settlement of the litigation but which have not become Ms. Reye's property, then there would be no conflict with section 1917(a) of the Act. This is because section 1917(a) only precludes States from placing liens on an individual's property. It would appear that New York has an interest in the potential personal injury settlement since Ms. Reyes' rights to recover payment for medical care must have been assigned to the State under section 1912 of the Act in order for her be eligible for Medicaid. In that event, if New York places a lien on these funds, it does not violate the Medicaid statute. However, it cannot impose a lien on any of Ms. Reyes' property which has not been assigned to the State.

It appears that the State has some options in dealing with Ms. Crannage. It could, if permitted under State law, place a lien on the tortfeasoer's property. It could agree with Ms. Crannage on a settlement of the tort action i which it gets an appropriate interest or it could intervene in the case and represent its own

interests directly.

While this information is not intended to settle the differences you have with Ms. Crannage, I hope it helps you understand the Federal government's role concerning the administration of the State's Medicaid program.

Sincerely,

Sally K. Richardson
Director
Medicaid Bureau

APPENDIX G

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

6025 Security Boulevard
Baltimore, M.D. 21207

June 5, 1996

TO: ALL STATE MEDICAID DIRECTORS

SUBJECT: Treating Disability Trusts Under Transfer of Assets, Trust Estate Recovery, and Third Party Liability Rules and Information

Transfer and Trust Rules of OBRA'93

The Omibus Budget Reconciliation Act of 1993 (OBRA'93) generally tightened eligibility rules governing the use of trusts by Medicaid applicants and recipients to discourage the transfer or sheltering of income and resources. Section 1917 (c) of the Social Security Act (the Act) prescribes a penalty for individuals who transfer assets for less than fair market value. Section 1917(d) requires that States count, for purposes of an individual's Medicaid eligibility, trusts established by an individual (or certain other designated persons) if assets of the individual were used to form all or part of the trust coupus. An individual's 'assets' as defined in section 1917 (e)(1)(A), include all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or spouse is entitled to but does not receive because of action by the individual or by certain other designated persons or entities.

Recently, several State courts have focused the right of disabled individuals to receive Medicaid after assets they have received as a third party settlement or award have been placed into a trust. Because of the definition of asset introduced by OBRA '93, the

trust and transfer rules could apply to the proceeds of a disabled individual's settlement with or judgment against a third party, such as a casualty insurance company. The rules could apply if the individual would have otherwise been legally entitled to those proceeds had they not been diverted away from the individual into a trust.

To be covered by the trust rules in section 1917(d), a trust must have been established by an individual, other than by will, with assets of the individual forming all or part of the trust corpus. The trust is considered to have been established by the individual if it has been established by the individual: the spouse; a person, including a court or administrative body with legal authority to act in place of or on behalf of the individual or spouse; or by a person, including any court or administrative body acting at the direction or upon the request of the individual or spouse.

If a court establishes a trust on behalf of or at the behest of an individual, it is covered by the trust rules. If a third party establishes a trust to satisfy a judgment or to pay a settlement, and the trust is required by or approved by a court or administrative body, such a trust also falls within the coverage of section 1917 (d). The court or administrative body has acted, in its legal capacity, on behalf of or at the request of the individual, to help establish the trust. Even absent the involvement of the court, if the individual has requested a trust, or accepted the terms of a trust to resolve a claim, the trust established by a third party falls within the coverage of section 1917 (d) because the third party's actions are interpreted as those of a person action at the direction of or upon the request of the individual.

As a general rule, then, a trust which results from a third party award or settlement is regarded as subject to the trust rules. This means that the corpus of the trust, interest on the corpus, and payments from the trust will be considered as either available resources, income, or as transferred for less than fair market value, depending upon the rules in section 1917 (d) relating to how the trust is constructed and how mush it can benefit the individual.

There are, however, several exceptions to the general rules which could apply to disability trusts established by third parties. Section 1917 (d)(4)(A) says that the trust rules do not apply to a trust containing the assets of a disabled individual under age 65. A second exception which could apply to third party settlements is contained in section 1917 (d)(4)(C). This exception applies to 'pooled' trusts which contain the assets of a disabled individual if the trust is established and managed by a non-profit association. Separate accounts must be maintained for each trust beneficiary, although these accounts may be pooled for purposes of managing and investing the trust fund.

How Third Party Liability TPL Rules and Assignment of Rights Effect Trusts

Federal law at section 1902 (a)(25)(A) of the Act requires States to take all reasonable measures to ascertain the legal liability of third parties to make payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is or may be liable to pay all or part of expenditures for medical assistance furnished under the state plan. Where such a legal liability exists, section 1902 (a)(25)(B) requires a State to seek reimbursement for medical assistance payments already made.

All individuals, at the time of application and as a condition of eligibility for Medicaid, must assign to the State their rights to payment for medical care from any third party and, subject to several exceptions, must cooperate with the State in its pursuit of any third party who might be liable for such payment as required by section 1912 (a)(1) of the Act and 42 CFR 433.145 of the Medicaid regulations.

Thus, if an individual is already Medicaid eligible at the time he or she receives a third party settlement or judgment, the State has claim to any portion of the proceeds which were intended to pay for medical care for the individual that is covered by Medicaid. If the individual negotiates with the third party to place these

amounts in a trust or otherwise fails to help make the amounts available to the State, then that individual has violated the conditions of eligibility in section 1912 which requires the individual to cooperate with the State in obtaining payments for medical care from a third party. The individual would lose eligibility, regardless of the trust provisions and exceptions in sections 1917 (d)(4)(A) and (C).

If State law permits, a State can place a lien upon a third party's property, as in a situation involving the property of a tortfeasor or defendant in a personal injury suit, or upon fund which are set aside to be used in a settlement, but which have not yet become the property of the Medicaid applicant or recipient.

Section 1917 (a) precludes States from placing liens on an individual's property. However, because a potential personal injury settlement is not yet the plaintiff's property, it can be subject to a TPL lien. Also, proceeds placed in a trust are not the property of the individual, but belong to the trust. As such, a State could place a TPL lien on any proceeds in a trust which could be used to pay for medical care covered in the State's plan, provided there were State laws allowing this.

To avoid the lien issue, but protect its rights, a State could come to a agreement with a plaintiff on the settlement of a tort action in order to get an appropriate share. Alternatively, the State could intervene in the case and represent its own interests directly. Since the individual has assigned to the State his or her rights to recover payment for medical care under section 1912, the State has an interest which it can represent directly.

When TPL Does Not Affect a Trust

The situation is different if the individual receives a third party settlement or judgment prior to applying for Medicaid. At the time of application, the third party has extinguished its legal liability to the individual by paying off the judgment or providing settlement proceeds. As a result, the individual will no longer have a right to

any third party payments to assign to the State. This would be the case, unless the trust itself has the purpose of providing medical care that would otherwise be covered under Medicaid ...trust as a liable third party. However, many trusts established as the result of a judgment or settlement are designed as 'supplemental needs' trusts. These kinds of trusts are drafted so that the trustee can only pay for items or services for the individual which are not covered by Medicaid and/or other similar programs.

How the proceeds of a judgment will affect a disabled individual depends upon their form. If the individual has received the proceeds outright and retained them, they are likely to be counted as income or resources that are available to the individual for eligibility purposes. These proceeds, if large enough, could render the individual ineligible. If, on the other hand, the proceeds have been placed in a trust, the result depends upon whether the general trust rules apply or whether the trust qualifies for an exception.

Trusts Which Meat the Exceptions in Section 1917(d)(4)

A disabled individual might avoid having the trust counted if the trust is designed to meet one of the exceptions in section 1917 (d)(4). To qualify for the exceptions, the trust must be established by an appropriate person or entity, as well as meet other requirements. For purposes of section 1917 (d)(4)(A), the trust must be established for a disabled individual under age 65 by a parent, grandparent, legal guardian, or a court (but not by the individual). If the trust is established by the court and meets the other (d)(4)(A) requirements, then it would be subject to this exception. If the third party itself establishes the trust at the direction of or upon the request of any of the enumerated parties (all of whom are considered substitutes for the individual), the trust qualifies for this exception, with the third party acting, in effect, at the direction or upon the request of the individual.

The second exception for a disabled individual in section 1917(d)(4)(C), for a 'pooled' trust requires that the trust be established and managed by a non-profit association, with an

account for the individual established solely for the individual's benefit by the individual, a parent or grandparent, legal guardian, or by a court. Again, if the trust account is established by the court, the exception would apply. The exception would also apply if the third party itself establishes the trust account at the direction of or upon the request of any of the enumerated parties.

Treating Excepted Trusts: Use of Funds and Estate Recovery

If the trust meets one of the exceptions, the Estate can monitor distributions from the trust to be sure that, in the case of a (d)(4)((A) trust, funds in the trust are used for the benefit of the disabled individual, and in the case of (d)(4)(C) trust account, soley for the disabled individual's benefit. Before the disabled individual dies, the State must collect whatever remains in the trust or account (if not retained by the "pooled" trust), up to the amount of medical assistance paid by the State.

If the State has not been totally reimbursed from the trust, then the State must follow the estate recovery rules in section 1917(b) of the Act. This provision requires that if an individual has been permanently institutionalized, the State must seek recovery from the individual's estate of any assistance correctly paid or upon sale of a home that has been subject to a lien imposed on account of medical assistance the State has paid.

Section 1917(b) also requires the State to pursue recovery from an individual's estate for the costs of nursing facility services, home and community-based services, and related hospital and prescription drug services, in the case of individuals who received these services when they were age 65 or older. States can also choose to pursue the costs of any other items or services under the State plan for these same individuals.

If you or your staff have any questions concerning the above, please contact your regional office.

Sally K. Richardson
Director
Medicaid Bureau

cc: All Associate Regional Administrators
Division of Medicaid

APPENDIX H

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
6325 Security Boulevard
Baltimore, MD 21207

Sept. 9, 1996

Ms. Patricia L. Harrison
Attorney at Law
810 Bellwood Road
Columbia, South Carolina 29205

Dear Ms. Harrison;

I am responding to your recent letter to Sally Richardson in which you asked for additional clarification of her memorandum to all State Medicaid directors covering the treatment of disability trusts under transfer of assets, trusts, estate recovery, and third party liability rules. You state that you still have questions about the timing of a State's recovery from a supplemental needs trust.

Specifically, you have asked about a State's right to recover from the proceeds of personal injury settlements when the settlement is placed in a supplemental needs trust covered under §1917 (d) (4) (A) of the Social Security Act (the Act) (42 U.S.C. §1396 p(d) (4) (A)). Your main concern appears to be whether a State can assert its claim prior to when the trust is actually funded by the settlement proceeds. You state that you believe that the Supreme Court of Nassau County, New York, was correct in the Link case, which held that congress intended that the State recover only after the death of the disabled person.

You have stated that you believe that, if a State can recover before funds are placed in a special needs trust, a disabled person is at risk of losing all of the benefits from a settlement simply because the tortfeasor delayed settlement. Your letter than describes, in the last paragraph on the first page, some questions relating to the timing of the settlement or the timing of when the disabled person

assigns his interest in the lawsuit to the trust.

It is our view that the issue if timing has an effect only in terms of whether a tort settlement occurs before or after an individual is eligible for Medicaid. If an individual is eligible for Medicaid, then he or she has, as a condition of eligibility under §1912 (a) (1) (A) (U.S.C. § 1396k (a) (1) (A)) already assigned to the State any right he or she has to the payment of medical care from any third party. Once the individual becomes Medicaid eligible, the State stands in that individual's place in terms of any payments for medical care covered under Medicaid that the individual has right to receive from any third party, from the day forward, until the individual's eligibility ends. If the State is in a position to represent its own interests in the case, it can request compensation not just for money it has already spent on the plaintiff's medical care, but for future expenses, just as a plaintiff who has not assigned these rights could in representing his or her own interests in covering future medical costs.

If an individual is Medicaid eligible at the time of settlement or judgment, the State has claim to any portion of the proceeds that were intended to pay for medical care for that individual that is covered under Medicaid, and that the individual needs as the result of injury caused by the tortfeasor. Neither the tortfeasor nor the plaintiff has the right to place Medicaid's claim out of reach by diverting it into a trust that benefits the plaintiff and not the State.

You mentioned in your letter the holding in the Link case, in which the court held that Congress intended that the State recover only after the death of the disabled person. unlike the court in Link, we do not believe that §1917(d)(4)(A), which cover certain special needs trusts for disabled individuals influence the outcome of the rules covering an individual's assignment of rights to third party liability payments. Section 1917(d)(4)(A), in turn excepts from the count amounts that are in certain existing trusts for disabled individuals under age 65, when those trusts are established for the benefit of the individual by a parent, grandparent, legal guardian or by a court.

There is no indication whatsoever that Congress meant to do anything in this provision but exempt from eligibility determinations that contents of an existing special needs trust. That is, the statutory language and legislative history include no indication that Congress meant to override or interfere with the assignment provisions in §1912(a). the court in Link admits that "(i)t may well be that Congress did not specifically consider personal injury actions and liens thereon in enacting the Federal SNT [special needs trust] exemptions,..." (December 14, 1994 N.Y.L.J. 32, col. 4) Rather than relying on the statute or legislative history, the court conjectures that the intent of Congress must have been to allow trusts to be used to supplement the needs of disabled persons without adverse Medicaid consequences, but with the potential for full Medicaid reimbursement.

The issue of the timing of a settlement produces a different result when a settlement takes place before an individual applies for Medicaid. As we described in the June 5, memorandum, the third party has extinguished its legal liability at this time by paying off the judgment or providing settlement proceeds. As a result, the trust is not available to the State under assignment, unless the trust itself has the purpose of providing medical care covered under Medicaid. In that situation, the trust itself could serve as a "third party" that is liable to pay for the plaintiff's medical care.

If we can be of further assistance please call Robert Nakieiny at (410) 786-4466.

Sincerely,

Steve McAdoo
Acting Director
Medicaid Bureau

cc: Associate Regional Administrator
Division of Medicaid